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SELECTED CASES

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THE LAW OF PARTNERSHIP

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LIMITED PARTNERSHIPS.

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BY

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CASES ON PARTNERSHIP.

CHAPTER I.

THE FORMATION OF A PARTNERSHIP.

§ 1. Partnership Inter Se: Results from Contract.

FINCKLE *v.* STACY.

Macnaghten's Sel. Cas. in Chancery, 9. 1725.

The parties to this action entered into joint articles for doing a particular piece of work for the late Duke of Marlborough, on account of which several sums of money had been jointly received by them and immediately divided between them. A sum remaining in arrear, Stacy asked Finckle to join him in a suit for its recovery. Finckle refused, and Stacy recovered his half of the sum. Finckle brought this action for a moiety of this recovery, on the ground that it was partnership money.

"But the court were of opinion it was not to be considered as a partnership, but only an agreement to do a particular act, between which there is a great difference; and that it is so is plain, for the money which they received they immediately divided, and did not lay out on a common account. . . ."

HOARE *v.* DAWES.

1 Douglas, 371. 1780.

The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the East India Company to Contencin, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the East India Company's sale, of which they (together with himself) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the company to give a warrant or warrants to the

broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, £25 per cent is advanced, and is forfeited unless the whole is paid on the third, which is the last, day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, between the time of the deposit of the warrants with the plaintiffs and the time when the payment was to be made at the India House, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead or become bankrupts. The shares of the defendants were to be two-sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two-sixteenths. There was not any joint concern in the redisposal of the tea. . . . Verdict for defendant, and rule *nisi* for a new trial.

The Solicitor-General, *Dunning*, and *Davenport*, for the plaintiffs; *Bearcroft*, *Lee*, and *Wood*, for the defendants.

LORD MANSFIELD. I considered this, at first, as a case of dormant partners. The law with respect to them is not disputed; viz., that they are liable, when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction and of these loans was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. . . . Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like East India bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference whether specific tea or the warrants are delivered at the sale. It would be most dangerous, if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni*. . . .

WILLES and ASHHURST, JJ., of the same opinion.

BULLER, J. This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute

a partnership, a broker would have it in his power to make five hundred persons partners, who had never seen or heard of one another; or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

The rule discharged.

Ex parte BRIGGS. In re NOTLEY.

3 Deacon & Chitty, 367. 1833.

Miss Briggs loaned £230 to Notley to enable him to establish a chocolate manufactory, and he gave a bond for the repayment of the same in five years with interest at five per cent. Later Notley agreed to pay her monthly one-eighth of the net profits of the business in addition to the interest. She alleged that such payments were to be in diminution of the principal; but Notley claimed they were to be made for the use of the money. After several monthly payments, he was unable to continue them, and being in default as to the interest also, Miss Briggs issued a fiat against him.

Mr. Montague and *Mr. Lovat*, for the petition.

Mr. Ching and *Mr. Swanston*, for the creditor.

Sir J. Cross. This is a petition of the bankrupt to supersede the fiat, on the ground that the petitioning creditor was his partner in trade. But, as his honor the Chief Judge has already stated, there was no contemplation of any partnership in fact. It is true, that if B. agrees to give A. a share in the profits of his business, the court may consider them *quasi* partners, for all purposes of responsibility to third persons. But B., after borrowing money of A., cannot turn round upon him and say, "you are my partner, by operation of law, and therefore I will not pay you your debt." This would not be permitted by any court, either of law, or equity. But even if there was a partnership between these parties, I think that this debt was independent of any partnership transaction, and is quite sufficient to enable a petitioning creditor to sustain a fiat. It appears to me, however, that there was no partnership in fact.

Petition dismissed.

The statement of facts has been abridged and the opinions of Erskine, C. J., and Sir G. Rose are omitted.

FISH v. THOMPSON et al.

68 Vt. 273: 35 At. 174. 1895.

Rowell, J. It is manifest that the bill cannot be maintained against the defendants, Tuttle and Slason, for the allegations relied upon for

relief against them[1] are negatived by the findings of the master. Nor do those findings show that the orator and the defendant Thompson were partners, as the latter claims. Thompson and Freeman were partners in business. The orator signed with Freeman for money that went into the concern, and, becoming alarmed lest he should lose thereby, he consulted Thompson about the matter, and thereupon procured a chattel mortgage and an assignment from Freeman of his entire interest in the partnership, for the sole purpose of security against such loss. At the time of the assignment it was understood between Thompson and the orator that the business should be closed out and sold as a whole as soon as possible, the debts paid, and the remainder divided between them according to their several interests. Freeman and the orator understood that, if anything remained in the orator's hands after such division and his indemnity, it should belong to Freeman. Freeman did not continue with the firm as an active member, but only as a clerk for wages; and the partnership was soon dissolved by mutual consent, for prudential reasons, and the firm name of C. A. Thompson & Co. adopted, the orator objecting to have his name appear in connection therewith. The business was thereafter carried on in the new name, Thompson being the managing man until his health failed, when he turned the business over to the orator, who took charge and proceeded to dispose of the property, buying no more goods, and closed out the stock in about two months. The relation that the orator originally sustained to Thompson and to the property and the business was never changed, and was never, so far as appears, understood by them to be changed; and Thompson knew what that relation was from the first, as the orator consulted him about the matter before he took his assignment. The orator was a mere security holder throughout, and therefore, as matter of law, any residue in his hands would belong to Freeman, as they understood it would. He could in no event participate in the profits as a principal trader in the management of the business, which is essential to a partnership, but does not of itself, as matter of law, constitute a partnership, though a most important element in determining whether one exists or not. Hence, as the orator had no community of interest in the profits as such principal, there was no partnership between him and Thompson. A community of interest by way of security for the payment of money by Freeman is not enough. Thus in Mollwo *v.* Court of Wards, L. R. 4 P. C. 419, the person sought to be charged as a partner advanced large sums of money to a firm of merchants, and took as a security a charge of 20 per cent commission on all the profits made by the firm until the whole amount of the debt due him should be paid off, with 12 per cent interest on all cash advances that had been, or might be thereafter, made by him to the firm; and large powers of control were conferred upon him, but he had no initiative power. The court held that the contract was really and in substance what it purported to be,

[1] The bill alleged that their claims were fraudulent.

namely, one of loan and security between debtors and their creditor, and not one of partnership, and said that if cases should arise where persons, under the guise of such an arrangement, were really trading as principals, and putting forward as ostensible traders others who were really their agents, the law would look to the body and substance of the arrangement, and fasten responsibility on the parties according to their true and real character.

The case stands for disposition, therefore, between Thompson and the orator, on the basis of a joint ownership between them of the character shown, and not on the basis that they were partners; and, as no question is made as to the sufficiency of the pleadings for such relief as they may be entitled to, the case stands for consideration in this behalf on its merits, leaving the parties to apply below for such amendments, if any, as they may deem necessary.

It makes no practical difference whether the firm was dissolved by Freeman's assignment to the orator, or by mutual consent soon after; for, if by the former, the rights and powers of the firm rested wholly in Thompson, as far as necessary to enable him to properly administer his *quasi* trust of settling the business, and accounting to the orator for Freeman's share of the residue remaining for distribution; and, if by the latter, Thompson was, as the case shows, the liquidating partner, and as such he was the agent of the late firm to collect and adjust its bills receivable, to convert its assets into money, to discharge its outstanding liabilities, and to pay over to the orator Freeman's share of the surplus. And in either view he has the right that partners generally have in respect of being reimbursed for advances, which is to have a lien on the assets, and, after the partnership debts are satisfied, to be paid before the surplus is divided.

The master finds that the orator has in his hands a balance of $294.29, derived from the business while he had charge of it. This he must account for. It is conceded, however, that he may deduct therefrom the sum of $150 due him for services in closing out the business, which leaves $144.29 to be accounted for.

The orator claims a personal decree against Thompson for $600 that he put into the concern in the manner following: Thompson applied to him, and said that the debts were pressing, and that he must furnish more money on that account, and to equalize what he himself had advanced; and thereupon the orator advanced $600, taking no evidence of indebtedness, and the amount was credited to him on the books of the concern, in his regular account. He claimed before the master that this was a loan to Thompson, but the master finds that he advanced the money for the purpose claimed by Thompson, namely, to pay the pressing debts of the concern, and that Thompson advanced a like amount for the same purpose. On this finding, the orator cannot have a personal decree against Thompson for this money. He must be taken to have assumed the risk of getting his pay out of the assets, the same as Thompson did; and this is the fair intendment of the find-

ing, as his claim of a loan to Thompson is negatived. But he has a lien on the assets for reimbursement, subject, however, to the rights of partnership creditors; for in the bill he expressly subordinates his rights to theirs, and the law does the same. Nor are his rights in this behalf superior to Thompson's rights, for they appear by the finding to have intended to put themselves on an equality in this matter, as one object of the orator's advance was to equal Thompson's advance. The orator claims no other allowances.

The defendant Thompson claims, under his cross bill, that, if there was no partnership between him and the orator, their joint ownership of the property was such as to make the orator liable for one-half of all the debts and expenses necessarily incurred in the management of the business, of which there are outstanding and unpaid the sum of $173.21; that in addition thereto he is liable for one-half of the $1,000 for which the Tuttle note was given by C. A. Thompson & Co., as the master has found that that money was used by Thompson in paying debts of Thompson & Freeman that were a lien on the goods, and in managing the business; and that the orator should pay to him one-half of these sums, aggregating $1,173.21, less what may be realized on the $320 of accounts due to Thompson & Co., although he is not liable on the Tuttle note, nor to the creditors to whom the other bills are due. But this claim cannot be maintained. Although by his assignment the orator became a joint owner with Thompson, yet he did not thereby acquire a right to joint possession of the partnership property, nor to a joint management and control of the business. On dissolution by death, the surviving partner settles the partnership affairs. So, on dissolution by the sale of one partner of his interest, or by his being adjudged bankrupt or insolvent, the other partner is entitled to the exclusive possession of the partnership property, and the exclusive management and control of the business for the purpose of winding it up. Harvey *v.* Crickett, 5 Maule & S. 336; Renton *v.* Chaplain, 9 N. J. Eq. 62; note to Gilmore *v.* Ham, 142 N. Y. 1 (1894); 40 Am. St. Rep. 571. And if the dissolution in this case is regarded as having been by mutual consent, and not by the assignment to the orator, Thompson's rights and authority in the premises would be practically the same, as against the orator, as he was the liquidating partner. So, in either view, he had no authority in law to charge the orator in this behalf, and no authority in fact appears; and there is no principle of equity on which the orator can be charged, as he had no right to participate in the management of the business, nor any power of control over Thompson in respect of it, except through the medium of the court of chancery, which, for cause shown, would interfere by appointing a receiver.

The other claims made by the defendant Thompson are based upon the idea of a partnership between him and the orator, and as none existed they cannot be maintained. . . .

An account has been taken that may be sufficient for the purpose of

a final decree, but, if not, such further accounting should be had as may be found necessary. The assets not realized upon should be converted into money, as far as possible, and the firm debts paid, after which the orator and the defendant Thompson will be equally entitled to be reimbursed their advances, and any residue remaining will be equally distributed between them. . . .

Reversed and remanded.

WHITNEY *v.* GRETNA STATE BANK.

69 N. W. (Neb.) 933. 1897.

RAGAN, C. This is an action in replevin for a stock of goods, brought to the district court of Sarpy County by the Gretna State Bank against Howard Whitney, sheriff of said county. The bank's claim was that the goods belonged to A. U. Hancock; that he became indebted to it (the bank) in a large sum of money, and pledged the goods by chattel mortgage to it to secure his debt. The sheriff claimed that the goods, after and before the making of the bank's mortgage, were the property of A. U. Hancock and S. E. Wolverton; that these two parties were co-partners; that he had seized the goods as theirs by virtue of certain attachments issued at the instance of their creditors. The case was tried to the court without a jury, a finding and judgment rendered in favor of the bank, and the sheriff prosecutes here a petition in error.

1. It is insisted that the finding of the court that the mortgaged property was the individual property of A. U. Hancock and that Hancock and Wolverton were not co-partners is not supported by sufficient evidence. The evidence shows without substantial conflict that Hancock established a general store at Gretna, Neb.; that he furnished all the capital that went into that business; that Wolverton never furnished any capital for the venture; that Hancock employed Wolverton to conduct the store, and in lieu of a salary promised to pay him as compensation for his services "a living out of the business," and, if the venture proved profitable, one-half of the profits. The evidence further discloses that Wolverton took charge of the store and conducted the business under this agreement as clerk and manager; that he and Hancock held themselves out to the world as co-partners; on their letter heads they designated themselves as A. U. Hancock & Co.; that in their reports to commercial agencies they held themselves out as co-partners; and that the creditors represented by the sheriff in this suit believed they were co-partners, and, relying upon that gave them credit. If this was an action by some creditor of Hancock & Co. against Hancock & Wolverton to recover a debt for goods he had sold them relying upon the fact that they were co-partners, we have not the slightest doubt but that Hancock & Wolverton, by reason of their conduct, would be estopped as against such creditor from asserting

that they were not in fact co-partners. But this is not the case before us. The question presented to us is: Were these men in fact co-partners? Was the property involved in this action co-partnership property, or was it the property of Hancock?

The relation of co-partners rests in contract. Whether two or more persons are co-partners depends upon intention, and, while a co-partnership may be established by the course of dealing and the conduct of the parties, and perhaps by the admission of each member thereof, still the relation, if it exists, must rest in the consent and the intention of the parties thereto. It is sometimes said in the books that parties, by their course of dealing, may make themselves partners as to creditors, notwithstanding they were not in fact partners. But this expression is not strictly accurate. An examination of all those cases we think will show that, where parties who were not partners have nevertheless been held liable as such, they were so held liable because, by their conduct, they had estopped themselves from averring that they were not partners. But in no case that I have been able to find has any court assumed to hold that two or more persons were co-partners as a matter of law when the persons had never agreed or intended to become such. The fact that Wolverton was to receive as compensation his living from the business, and was to receive a share of the profits of the venture if it should prove profitable, would not alone support a finding that Wolverton and Hancock were co-partners. It takes more than that to constitute a co-partnership. Wolverton had no interest in the subject matter of the venture. He had no power in the management or control of this venture other than that of an ordinary retail salesman. In Ætna Ins. Co. *v.* Bank of Wilcox, 48 Neb. 544, the precise question presented here was decided. . . . The decision in this last case followed Waggoner *v.* Bank, 43 Neb. 84, and Gibson *v.* Smith, 31 Neb. 354. We have been to some pains to re-examine this question, and we are satisfied that the rule announced in the cases referred to is supported by the great weight of authority. . . .

Affirmed.[1]

[1] In Phillips *v.* Phillips, 49 Ill. 437 (1863), CATON, Ch. J., said: "The only question in this case is one of fact. Was there a co-partnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy had arisen? It must be remembered in the outset, that this is a controversy *inter sese*, and is not between third parties and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone, cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a co-partnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed."

GOLDSTEIN *v.* NATHAN.

158 Ill. 641: 42 N. E. 72. 1895.

PHILLIPS, J. Two questions are presented and discussed as arising on this record, — one the indefiniteness of the agreement between the parties, and the other the application of the statute of frauds to the facts in the bill stated. The latter proposition will be first considered.

Sec. 2 of our statute of frauds and perjuries (ch. 59, 1 Starr & C. Ann. St.) provides that: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." The averment of the bill is "that the parties, being so possessed of, and owning said lots severally, on June 1, 1890, the complainant proposed to the defendant that they should make a joint venture or partnership in reference to said two lots, and that they should participate in the net proceeds to be derived from the sale of them; that one should be sold in a short time, and the other lot should be held longer," etc.

The right of each party to this agreement has been severally acquired, to each a separate lot, the title to which was held in severalty at the time of the alleged agreement. By the terms of the agreement the rights acquired by virtue of the deed by the appellee to his lot were sought to be qualified and limited. By this agreement, in consideration of appellant agreeing to divide with appellee the profits made by appellant on the sale of his lot, appellee was to divide with appellant the profits on his lot when sold. The contract was executory. Both sales were made, and it is sought to enforce the agreement as against appellee. The contract was not in writing. The agreement affected real estate the title to which had been acquired by appellee before the agreement. If the appellant had any interest in the lot, it was by virtue of the agreement relied upon, and was by parol, and would be within the statute. It is clear that an interest acquired in the land of another by a parol agreement is within the statute. This proposition is not controverted by the appellant, but it is urged that an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the statute, and the fact of the existence of the partnership, and the extent of each party's interest, may be shown by parol. In this connection it is insisted that, it appearing from the bill that the lots have been sold, nothing remains but to account for the profits, and it is denied the statute of frauds in any way controls the question. It is true that a partnership may exist for the purpose of dealing in lands for profit, and the existence of such partnership and the extent of the interests of the respective partners may be shown by parol. Speyer *v.*

Desjardins, 144 Ill. 641; Traphagen *v.* Burt, 67 N. Y. 30; Chester *v.* Dickerson, 54 N. Y. 1; Getty *v.* Devlin, Id. 403.

There is a wide distinction, however, between an agreement for one to become interested in the profits of certain land already purchased and owned by another and an agreement to share in the benefits to be derived from lands to be thereafter acquired. Where lands are purchased by a partnership, and paid for with the moneys thereof, or acquired as partnership property in the usual course of business of such partnership, a court of equity may treat such real estate as partnership funds, and, as a consequence, as personal property. This rule grows out of the nature of the partnership relation, and is rendered necessary for the purpose of doing justice between the parties, or between the firm and others doing business and having dealings therewith. Black *v.* Black, 15 Ga. 445. In this case the land was not purchased by appellant in the name of appellee, and the purchase money furnished by appellant. It is not a case of a purchase of lands paid for out of partnership funds, and a deed taken to appellee. No partnership funds existed. There was, therefore, no resulting trust in appellant, and whatever interest he is alleged by the bill to have acquired was by virtue of his contract. The lot was owned by appellee at the time of the contract, and paid for by his money, and any interest in the land or the proceeds growing out of the alleged contract cannot be severed and made to apply to the profits as distinct from the land itself. If the appellant acquired an interest in appellee's lot by virtue of his contract, it attached upon the contract being made. If such interest attached, and the land had not been sold, the appellant would have been entitled to his moiety therein. Had appellee died before sale, and appellant had an interest in the lot, he would have the right to sell and wind up the partnership affairs. It is only by having acquired an interest in the lot that he could have acquired an interest in the proceeds of the sale.

We hold that, where two separate owners of real estate, purchased by their separate funds, enter into a co-partnership with reference to a sale thereof by a parol contract, such contract is within the statute of frauds. Vose *v.* Strong, 144 Ill. 108; Smith *v.* Burnham, 3 Sumn. 435; McCormick's Appeal, 57 Pa. St. 54. We hold that the averment of the bill setting forth the purchase price and selling price of the lots, and that the net profits derived from the sale were to be participated in by the parties, is a sufficiently definite averment to authorize a finding by an interlocutory decree and a reference for an accounting between the parties. The statute of frauds, however, presents an insurmountable obstacle to the relief prayed for by appellant. It was not error in the appellate court to affirm the decree of the circuit court of Cook County.

The judgment of the appellate court is affirmed.

BURNEY *v.* SAVANNAH GROCERY CO.

98 Ga. 711: 25 S. E. 915. 1896.

ACTION by the Grocery Co. against D. H. Burney, son, and wife as co-partners. Mrs. Burney alone defended on the ground that while she agreed to become a partner, and while her name was used as that of a partner, in law she could not be a partner with her husband, so as to bind her separate estate, she being a married woman and plaintiff having notice of this fact. On the trial she asked to put in evidence the partnership agreement, which provided that she was to have nothing to do with the management of the business, and her interest was to extend only so far as allowing her name to be used for the security and accommodation of the firm. It was objected to and excluded on the ground that it contained secret stipulations which were not brought home to plaintiff.

W. G. Brantley, for plaintiff in error.

W. M. Toomer, *contra.*

LUMPKIN, J. 1. This case turns upon the question whether or not, in this State, a married woman may engage in business with her husband as a co-partner. In Francis *v.* Dickel, 68 Ga. 255, it was put in the form of a query: "Can a wife be her husband's partner in business?" We think this question was answered affirmatively by the principle laid down in Scofield *v.* Jones, 85 Ga. 816. After a careful examination of all our statutes, and many decisions, we have reached the conclusion that there is no law or public policy in Georgia which forbids such a partnership, provided, always, it is *bona fide* and actual, and not merely colorable. An alleged partnership cannot be used as a mere device for rendering the wife liable for, or subjecting her property to the payment of, debts of her husband. But, if they really engage in a business as actual partners, we see no reason why the partnership should not be regarded as a lawful one. The woman's law of 1866 went far towards the emancipation of married women. The only restrictions left upon their power to contract were designed for their protection and benefit. In all cases where these restrictions do not apply, they are as free to contract as men; and no one of these restrictions, so far as we have been able to ascertain, prevents a married woman from engaging in a partnership business either with her husband or another. There are many kinds of business in which she is calculated to make an excellent partner, and one who is likely to contribute to the success of the enterprise. The whole matter is summed up in the following quotation from the opinion of Chief Justice Bleckley in the case last cited: "There is nothing contrary to public policy in allowing husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of the family. Very often it would contribute to the well-being and pros-

perity of both, and to the permanent good of the family. No doubt, such a power can be abused and misapplied; but this is no reason for not recognizing its existence, or why the law should not tolerate it, if, on the whole, its results are beneficial rather than pernicious. At all events, we think the power exists at present under our law."

2. Conceding that a wife may lawfully enter into a partnership with her husband, secret stipulations in the partnership articles by which her liability as a member of the partnership is limited can no more in her case than in any other be made binding upon innocent third persons who contract with the partnership in ignorance of these stipulations. One who extends credit upon the faith of her full membership in the firm is entitled to hold her responsible, just as if she were a man or a *feme sole*.

Judgment affirmed.

DAVIS *v.* DAVIS.

[1894.] 1 Ch. 393.

SPECIAL case for the opinion of the court. Paragraph 5 of the case is as follows: "From the death of the testator until the death of C. F. Davis, the plaintiff and C. F. Davis carried on the business for their own benefit under the style of Lloyd & Davis," (the business name of the testator) "and on the same premises," (as had been occupied by testator) "which was advantageous in keeping together the connection. No articles of partnership were ever executed, nor any agreement for a partnership come to, nor was a partnership ever mentioned between the plaintiff and C. F. Davis. No accounts as between plaintiff and C. F. Davis were ever kept, nor was any balance-sheet or annual account as to the business prepared, but every week, and occasionally oftener, the plaintiff and C. F. Davis each drew from the business and retained for his use £3 or more, each one so drawing and retaining the same sum precisely as the other, and, save as aforesaid, no division of profits or other moneys was made." Other material statements appear in the opinion. The defendant was the widow of C. F. Davis.[1]

T. L. Wilkinson, for the plaintiff.

Ashton Cross, for the defendant.

NORTH, J. . . . The testator's will contains a devise and bequest of all the rest and residue of the testator's estate and effects unto his two sons, in equal shares, as tenants in common. Besides other property which is not mentioned in the case, the sons took this business as tenants in common, and they also took these three houses in Summer Street as tenants in common. At that time there was no partnership existing between them, and the property vesting in them as tenants in common did not in itself constitute a partnership; and the question is,

[1] The statement has been abridged.

whether anything took place afterwards which had the effect of constituting a partnership.

As regards the business, there is, I think, sufficient to show that there was a partnership. In the first place, § 1 of the Partnership Act, 1890, provides that "partnership is the relation which subsists between persons carrying on a business in common with a view of profit." That exactly describes the present case. I do not say that that is of itself conclusive, but it comes precisely within the definition therein given of a partnership. The special case admits that profits were divided, because the £3 a week or more which was drawn out by each brother weekly was really a division of profits, and the case states that "save as aforesaid, no division of profits or other moneys was made." Whether that £3 a week was or was not entirely profit, at any rate it is clear that it was in part a division of profits. Then sub-sects. 1 and 3 of § 2 of the Partnership Act, 1890, seem to me material. By sub-sect. 1: "Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof." Sub-sect. 3 is material, as bearing upon the question of partnership in the business, because I have come to the conclusion, for reasons which I will mention presently, that there was a partnership in the business, though the real estate was not brought into the partnership. To deal first with the business itself, sub-sect. 3 of § 2 of the act is, "The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business." Now that is exactly what took place here. Each of these brothers did receive at their regular drawings money derived, to some extent at any rate, from the profits of the business. Then sub-sect. 3 goes on: "But the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business." We have, then, a statement in the act that the receipt of a share of the profits of a business is *prima facie* evidence of a partnership, but that the receipt of such a share does not of itself make the receiver a partner in the business. These phrases appear somewhat conflicting, but I do not think there is any real difficulty in understanding them, because the matter was clearly explained by the Court of Appeal in Badeley *v.* Consolidated Bank, 38 Ch. D. 238. It is true that that case was decided before the Act of 1890 was passed, but the act seems to me to give effect to what was there laid down. . . . In the present case I cannot treat the receipt of a share of the profits alone as *prima facie* evidence of a partnership if there are other circumstances to be considered side by side with it. But I cannot find any other circumstances which conflict with it. Therefore, I think that this sub-section applies, and that the receipt of a share of profits is *prima facie* evidence of a partnership in the business from which the profits were derived. But I go farther, for there are certain cir-

cumstances which not only, in my opinion, do not conflict with, but, so far as they indicate anything, are in favor of that view.

In the first place, each partner drew precisely the same sum, generally weekly, but sometimes oftener. The sum drawn was usually £3 by each, sometimes it was more; but when the one drew more than £3 the other also drew more. From these facts I come to the conclusion that there must have been some agreement as to the mode in which the two brothers were to draw out money. It is impossible to believe that the necessities of the two were always so exactly equal that each required precisely the same sum per week that the other did. I come, therefore, to the conclusion that the equality of their drawings arose from some agreement between them that the drawings out of the profits should always be exactly equal.

There is another thing which ought not to be ignored, although I do not wish to attach too much weight to it. It is clear, and it has not been disputed, that the business was carried on by the two brothers in such a way as to make them liable as partners to outsiders. Of course, it does not follow that, because two persons carry on a business in such a way as to render them liable as partners to outsiders, it is the necessary consequence that they are partners *inter se*, but the circumstances may be such as to show that they were. For instance, a published statement that they were partners would be strong evidence that they were so for all purposes. In my opinion, a statement by conduct comes to precisely the same thing if you arrive, from their conduct, at the conclusion that they have held themselves out to the world as partners. That was clearly so here, and I think it is evidence of an agreement for a partnership. I do not wish to attach too much weight to it, but I think, in the absence of anything to the contrary, the fact that the two brothers were partners to some extent is some evidence that they were partners altogether.

Again, they borrowed money on mortgage upon two occasions, and put it mainly, at any rate, into the business. The special case shows that there were joint mortgages by the two, and each of them would be liable for the mortgage money. It is not stated that each brother mortgaged his own interest to secure the mortgage money, but that "the plaintiff and C. F. Davis borrowed £300" on the first occasion and a similar statement is made as to the second borrowing. I infer from that that they were joint mortgagors, jointly liable for the debt, and that each was chargeable with the whole. Therefore, I find that they jointly borrow money, for which they become jointly liable, and that they put the money so borrowed into the business which they carry on together. I think that is an indication of some weight that a partnership existed between them. I come, therefore, to the conclusion upon the act, assisted by these various circumstances which I have mentioned, that the two brothers were partners as regards the business.

As regards the land, I have come to a contrary conclusion. It is not the law that partners in business, who are the owners of the prop-

erty by means of which the business is carried on, are necessarily partners as regards that property. That conclusion is indeed expressly negatived by sub-sect. 1 of § 2 of the Act of 1890, and there are many cases before the act to the same effect. There is the well known case of Fromont *v.* Coupland, 2 Bing. 170, in which two persons horsed a coach, and shared the profits derived from running it, and were held to be partners, though they were not partners in the horses by which the work was done. Take, again, the well known case of the ships owned in common. Again, there is the case of Steward *v.* Blakeway, L. R. 4 Ch. 603, in which land belonging to co-owners as tenants in common was used for the purpose of carrying on a quarrying business, but that of itself was not considered sufficient to make the co-owners partners in the land. In fact, sub-sect. 1 of § 2 of the act seems to me conclusive, unless there is something else in the case, that the two were not partners in the land. The land was vested in them as tenants in common, each, that is to say, being owner of an undivided moiety; and if the land became partnership property, the question would arise when and how it became so; and there is no evidence that anything was done by agreement to make the land partnership property, and the facts to which I have referred as supporting the view that there was a partnership in the business do not apply to the land.

. . . .

There are, no doubt, cases in which land has been considered to have been brought into a partnership by reason of the nature of the business.

In Waterer *v.* Waterer, L. R. 15 Eq. 402, two persons were partners in business as nursery gardeners. Lord Justice James, in giving judgment, said: "I am of opinion that this case is governed by that class of cases in which Lord Eldon said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if, in fact, it was substantially involved in the business. . . . A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriate the soil itself for gardening purposes which could not be carried on without it. It is, in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs, from the trees and shrubs themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate." . . .

I have looked at many other cases bearing upon this point, and I have found several other instances in which lands have been held to be, to use the words of Lord Justice James, "involved in partnership dealings," and therefore regarded as partnership property. . . .

In my opinion, the mere fact that the two houses, which, according

to the special case, were not more fitted than any others for the carrying on of the business, were used for it, did not make them involved in the partnership dealings in such a way as to become partnership property. As regards the mortgages, it must be borne in mind that they stand on exactly the same footing: one comprised houses which were used for the partnership business, and the other comprised a house and land which were not used for partnership purposes at all. Therefore, I do not think the mortgages throw any light upon the matter. The only remaining fact is, that, during the continuance of the partnership between the brothers, they used part of the premises, No. 60, for partnership purposes. They began for the first time to use No. 60, Summer Street, for the partnership purposes in October, 1889, and they spent some money in adapting it to their purposes, and that money was the joint money of the two brothers. But, in my opinion, that is not enough to indicate that there was a partnership in the land. If the money which they expended in adapting this additional piece of land had been spent in buying it, instead of improving it, it is clear that it would not have become partnership property; because, in that case, it would have been hit exactly by sub-sect. 3 of § 20 of the Partnership Act, which says: "Where co-owners of an estate or interest in land, . . . not being itself partnership property, are partners as to the profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of any agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase." In the present case, the money which was borrowed was not employed in paying for the additional piece of land which was brought into the business; if it had been, the case would have been exactly within that sub-section; but the case seems to me so like that, that, although it is not literally covered by the sub-section, the same law applies to it.

Under the circumstances, I come to the conclusion that there was a partnership in the business, but that none of the houses Nos. 60, 62, and 64, Summer Street, were partnership property.

OLIVER v. GRAY.

4 Arkansas, 425. 1842.

OLIVER sued Gray on a note; the latter filed an account against Oliver for $61.50. To prove the account Gray produced an agreement, under seal, by which it was stated that Oliver had sold Gray half of a certain horse, and that Gray was to keep him for eighteen months, "and the partners Gray and Oliver" were to pay an equal portion of

the expense of the horse during that time. He then proved that he had kept the horse for the time charged in the account, and that the keeping was worth the price charged. The account was received and Gray had judgment for $20 and costs. Oliver brought error.

Trimble, for plaintiff in error.

Pike & Baldwin, *contra.*

DICKINSON, J. The plaintiff in error insists that there was no debt due by Oliver to Gray, but to them jointly as partners. We apprehend there is nothing in the contract constituting them partners. There is certainly no community of profit and loss arising out of their agreement. It amounts, in our opinion, to a mere joint interest in the horse alone, and an agreement on the part of Oliver to pay Gray one-half of the actual expenses incurred in keeping him. They styled themselves partners in the contract, yet the nature and terms of the agreement clearly show that they are merely part owners. Nicoll *v.* Mumford, 4 J. C. R. 522; *Ex parte* Parry, 5 Ves. 575; 3 Kent's Com. 16, 17. The debt accrued to Gray in his individual character; and as it was mutual, and subsisting with Oliver's demand against him, it was a proper subject of set-off. *Judgment affirmed.*

DWINEL *v.* STONE.

30 Me. 384. 1849.

SHEPLEY, J. The defendant was summoned as trustee in a suit in favor of the plaintiff, against Nathaniel H. Sawtelle, and suffered a default to be entered, without making any disclosure. This suit is *scire facias*, against him as such trustee. He has appeared and made a disclosure as authorized by the provisions of the statute, ch. 119, § 78, and has been adjudged to be the trustee of Sawtelle for a certain amount. The case is presented on exceptions taken to that adjudication.

It is contended in the first place, that he cannot be liable on his disclosure, because there appears to have been a partnership between himself, Sawtelle, and William Spaulding, in the business, out of which his indebtedness arose.

Partnerships are of different kinds. Some are general, and others are limited to a particular business or to one transaction. There may be a partnership embracing a capital invested in the business and also the profit and loss arising out of it. And there may be a partnership embracing only the profit and loss. There may be also business transactions, from which the persons concerned may receive profits and be subjected to losses; and yet there may be no partnership. The mere fact of a participation in profit and loss does not necessarily constitute a partnership. Many of the elements constituting one may exist, while others equally essential do not.

One essential element of a partnership is a community of interest in

the subject matter of it. *Tenet totum in communi et nihil separatim per se* has been the key-stone of the arch since the days of Bracton. From this arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power as all the partners could when acting together.

Another element is, that upon a dissolution of the partnership by the death of one of the partners, the survivors become entitled to retain and dispose of the partnership effects for a settlement of all its affairs and for a distribution of the remaining fund. However the arrangement of business may assimilate it to a partnership, if it be such that, on the death of one interested, this becomes impossible, it will be evidence that there was no proper partnership existing.

By the application of these rules it will not be difficult to determine whether a partnership proper is proved to have existed by the answers of the defendant. Whether one existed or not, is an inference of law from the facts; and his frequent statements, that they were partners, can have no effect.[1]

It appears from the answers that a written permission to cut and haul logs, from township numbered six in the eleventh range of townships, was made by Leonard Jones to S. Boody, who assigned it to Sawtelle, who at the same time assigned it to the defendant, who paid fifty dollars for it to Boody by Cooper & Co., and made a conditional assignment of it and of the timber cut under it to Cooper & Co., as security for the payment of goods furnished by them for the operation. He says, "Sawtelle made no advance except his own labor," which shows that no capital was promised or advanced on their joint account. The account of the goods thus furnished was kept in such manner that "Luther Stone, Telos," was made their debtor. Telos was the name of the lake into which the logs were hauled. All orders drawn upon Cooper & Co. appear to have been signed by the defendant, or by the name, "L. Stone, Telos." The defendant states, "It was understood between me and Cooper, that the business was to be done agreeably to the assignment, which was in my name." He states that he has no recollection that there was any understanding between himself, Sawtelle, and Spaulding, whose name "the concern should be in;" that "Sawtelle, Spaulding, and I finally agreed to take said permit and go on with the operation as partners, sharing profit and loss." "Sawtelle had no interest except as partner." It is therefore apparent that "Luther Stone, Telos," was not used or agreed to be used as the name of a partnership, for he states that his co-operators made no agreement respecting it, and that he agreed with Cooper & Co. that the

[1] Counsel for defendant had argued that his undisputed statement that Sawtelle, Spaulding, and he agreed to be partners, intended to be partners, acted as partners, and were understood by those dealing with them to be partners, must be taken to be true, and established the existence of a partnership, unless the plaintiff could show that they were mistaken as to what a partnership was.

business should be done in his name. The account is in effect the same as it would be if Telos was not annexed to it.

These answers clearly show that the defendant alone paid for the permit, the amount paid for it being charged to him; that the title to it, and to the lumber cut under it, was in him alone, subject to the title of Cooper & Co., as mortgagees. There could, therefore, be no community of interest between the defendant, Sawtelle, and Spaulding in the capital upon which the labor was performed and the business transacted. The labor was performed upon the lumber, and its price or value became immediately incorporated with it. There were no funds, no effects, no means, for profit and loss separate from the lumber or capital. There could, therefore, be no profit and loss, or interest separate from the capital, in which there was a community of interest, and which could constitute a partnership proper.

No one but the defendant could have disposed of anything pertaining to the business. If he had deceased, there would have been no property or effects so situated that the survivors could have made any use or disposition of it to settle the business, and to obtain payment for their labor by a distribution of the surplus. The personal representative of the defendant must have adjusted the whole business, and Sawtelle and Spaulding must have received from him their share of the profits realized upon a close of the whole business, by way of compensation for services performed for him. There was, therefore, no partnership proper existing between them.

The transaction was similar in principle to that of a common enterprise for profit and loss, which does not constitute a partnership, although it may combine some of its elements. As in the case of Dreg *v.* Boswell, 1 Camp. 329, where the owner of a lighter agreed with a person to work in it, and to divide with him the profit and loss. Or as in the case of Hesketh *v.* Robinson, 4 East, 144, where goods were purchased on the credit of one to be transported and sold by another, under an agreement to divide the profits. Or as in case of a shipment of specie or timber, upon an agreement to divide the profits. Rice *v.* Austin, 17 Mass. 205. Or as on an adventure in a whaling voyage, or in a contract of "mateship," where there is an agreement to share the profits. Baxter *v.* Rodman, 3 Pick. 435. Or as in the manufacture of goods from the raw material, under an agreement to share the net profits. Denny *v.* Cabot, 6 Metc. 82; Loomis *v.* Marshall, 12 Conn. 69. Or it may, perhaps, in principle, be more like the case of Finckle *v.* Stacey, Sel. Ca. 9, where two persons agreed to do a job of work on joint account. In such case, they must share in the profit and loss, and yet they were not regarded as partners. . . .

Exceptions overruled.

§ 2. Specific Intent to form Partnership not Essential.

GREEN *v.* BEESLEY.

2 Bing. N. C. 108. 1835.

The declaration stated that on the 29th of January, 1827, it was agreed between the plaintiff and the defendant as follows: viz., the said plaintiff agreed to horse (that is to say), to convey by horse and cart the mail from Northampton to Brackley, and back again from the latter place to Northampton, punctually and within the time, as near as might be, to be paid for such performance at and after the rate of £9 sterling per mile per annum; and the defendant agreed to pay or cause to be paid unto the plaintiff the sum of £9 per mile per annum (ratable), the same to be paid at the expiration of each quarter of a year, from the commencement of the said agreement; provided always, that the said agreement, in that and every subsequent article, should be punctually and properly fulfilled. And it was further agreed on the part of the plaintiff to pay for one cart, then in use for the above purpose, the sum of £18, the same to be paid into the hands of the defendant forthwith. And the plaintiff further agreed to pay for, in a fair proportion with the defendant, all repairs or replacing of carts, so long as that agreement should be in force. It was also agreed that the moneys received for the conveyance of all packages or parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by loss or damage of such or any such packages or parcels. . . . The plaintiff then, after averring mutual promises and performance of the stipulations of the engagement on his part, . . . alleged, as a breach by the defendant, the non-payment of the sum of £9 per mile per annum, ratable, at the expiration of each quarter of a year; and that the defendant had not, since the making of the said agreement, fairly and equally divided between himself, the defendant, and the plaintiff, the moneys received by the defendant, for the conveyance of packages and parcels.

Demurrer and joinder.

J. B. Harrison, for defendant.

Merewether, *Serjt.*, for plaintiff.

Tindal, C. J. In this declaration there are two breaches: the first, on the defendant's non-payment of £9 per mile per annum to the plaintiff, for horsing the mail-cart from Brackley to Northampton; the second, for not dividing between the plaintiff and defendant moneys received by the defendant for the conveyance of parcels.

As to the first, if it had not been connected, by the terms of the agreement, with the subsequent stipulation for dividing the profits arising from the carriage of parcels, it would have been a demand on which the plaintiff would have been clearly entitled to recover; but it is impossible not to see that this £9 per mile was not to be paid at all

events, but only upon taking the balance of the whole account between the parties; for it is to be paid, "provided always that the said agreement in that and every subsequent article should be punctually and properly fulfilled." The payment, therefore, accrues not on an absolute, but on a conditional agreement; namely, the punctual performance of the stipulations subsequently set out: and according to those stipulations the plaintiff and defendant are partners in profit and loss; for it is agreed that "the moneys received for the conveyance of all packages or parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by loss or damage of such or any such packages or parcels." And I have always understood the definition of partnership to be a mutual participation in profit and loss. The payment of the £9 per mile, therefore, depending on the observance of all the stipulations between the parties, draws down to itself the rest of the agreement, which constitutes a partnership concern, and renders it impossible to separate the first breach from the entire agreement.

Park, Gaselee, and Bosanquet, JJ., delivered concurring opinions.

Judgment for defendant.

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§ 3. A Common Business with a View of Profit.

HELME *v.* SMITH.

7 Bing. 709. 1831.

This was an action by the plaintiff, as part owner and managing owner of the ship "Brailsford," against the defendant, another part owner of the same ship, for his portion of the balance due to the plaintiff for the outfit of the ship for several voyages. The arbitrator awarded and adjudged that the plaintiff do recover against the defendant the sum of £462 8*s*. 6*d*., being the balance due at the time of the commencement of the suit from the defendant, as owner of one-fourth part of the ship "Brailsford" to the plaintiff as such part owner thereof, for the share of the defendant of the expenses incurred and paid by the plaintiff as managing owner or ship's husband, for the outfit of the said ship for four several voyages.

Wilde, Serjt., having obtained a rule *nisi* to enter up judgment for the plaintiff for £462 8*s*. 6*d*., pursuant to the award,

Jones, Serjt., showed cause.

Tindal, C. J. On looking at this award, the question arises, whether an action will lie by one part owner of a ship against another for his share of the expenses of outfit.

If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods,

the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to show that they were more than part owners, and the question is, whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to show that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance, and if the plaintiff had lent either of the part owners the capital he was to contribute, that would clearly have formed the ground of a separate claim. It might have been otherwise, if, by the course of trade, it were the custom for a ship's husband to look to the returns of the ship for the payment of his bill; but no such custom is stated on the award, nor anything to show that the plaintiff and defendant were partners.

Rule absolute.[1]

FRENCH *v.* STYRING.

2 C. B. N. S. 355. 1857.

THE plaintiff was a trainer of horses at Newmarket; the defendant was a wine-merchant at Huddersfield. In the month of March, 1854, a race-horse, called Census, was jointly purchased by the plaintiff and one Cohen. The latter afterwards sold his share of the horse to one Mallinson; and it was agreed between Mallinson and the plaintiff that the plaintiff should keep the horse for the purpose of training him, and should have the entire control and management of him; that 35*s.* per week should be allowed as the expenses of his keep; that the plaintiff should pay the expenses of entering the horse and conveying him to the different races; that each of them should pay one-half of the horse's keep and other expenses; and that the winnings should be equally divided between them. Mallinson having subsequently sold his share of the horse to the defendant, the latter agreed with the plaintiff that he should continue to keep, train, and manage him upon the same terms as had been agreed on with Mallinson. The horse was entered and ran at several races, but never won anything, and, having ultimately broken down, was sold at Tattersall's for £20. The plaintiff now sought to recover from the defendant £165 11*s.* 10*d.*, being the moiety of the keep and expenses of the horse since the defendant became possessed of his moiety, allowing in the particulars credit for £10, the moiety of the sum for which the horse was sold. There had been no previous settlement of accounts between the parties.

On the part of the defendant, it was submitted that this community

[1] A part of the statement and the concurring opinions of PARK, GASELEE, and BOSANQUET, JJ., have been omitted.

of profit and loss constituted a partnership between the plaintiff and defendant, and therefore that the plaintiff could not recover in a court of law in respect of the claim set up in the second count.

The learned judge directed a verdict for the plaintiff for the amount claimed, reserving to the defendant leave to move to reduce the damages by the sum mentioned in the second count, if the court should be of opinion that the transaction created a partnership.

Atherton, Q. C., obtained a rule *nisi*.

Hawkins showed cause.

Willes, J. The agreement here amounts to the sort of tenancy in common mentioned in the section of Littleton to which I referred in the course of the argument. The effect of the agreement seems to be this, that the plaintiff should keep and train and have the exclusive management of the horse, entering it and conveying it to the different races, and doing everything necessary to put it in a condition to run, and, in the event of the horse winning, paying over to the defendant one-half of the amount of such winnings. It in truth amounts to no more than a contract between two tenants in common, whereby the one agrees, in consideration of certain things to be done by the other, to abstain from exercising his rights in respect of the chattel held by them in common. It is no more a partnership than if two tenants in common of a house agreed that one of them should have the general management, and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided between them equally. Even if this were to be looked upon as a contract of partnership, the point at which the partnership would necessarily commence is that at which the horse is put upon the turf in a condition to run for stakes. The payments sought to be recovered here are payments made by the plaintiff in the nature of advances on behalf of the defendant anterior to the time at which any partnership could commence. Without expressing any decided opinion upon the first point, upon the second ground I concur with the rest of the court in thinking that the plaintiff is entitled to recover upon the second count as well as upon the first, and therefore that the rule to reduce the damages must be discharged.

Rule discharged.[1]

GOELL *v.* MORSE ET AL.

126 Mass. 480. 1879.

Tort for the conversion of one-half of a horse. Answer, a general denial.

The defendant Willis, before purchasing the horse in question, informed the plaintiff that the horse was for sale for $350, and proposed

[1] The opinions of Cockburn, C. J., and of Cresswell and Crowder, JJ., have been omitted. See Littleton, § 221.

that the plaintiff should join him in the purchase of the horse on speculation, and after seeing the horse, the plaintiff agreed to do so. Thereupon Willis purchased the horse on January 11, 1873, and the plaintiff gave Willis $150, and received a receipt therefor. The plaintiff and Willis then agreed that either of them, having possession of the horse, should provide for his keeping, without cost to the other, and that each should offer him for sale and endeavor to procure a purchaser at a profit over his cost, but that neither should sell the horse without the concurrence of the other. Under this agreement, the horse was sometimes in the plaintiff's possession and sometimes in Willis's possession, was advertised and exhibited for sale by them severally, and kept at the cost of each, as he happened to have possession of him. On or about November 7, 1875, the horse, having been placed by Willis in the stable of the defendant Morse in July previous, and the cost of his keeping having become large and beyond the ability of Willis to pay, was sold to Morse by authority of Willis for $375, out of which Morse retained the cost of the horse's keeping, and paid the balance, in furniture and cash, to Willis. No part of the proceeds of such sale was paid to the plaintiff, or accounted for to him, and the sale was made without the knowledge or consent of the plaintiff, and without any reservation as to his half interest in the horse. After the sale and before bringing this action, the plaintiff demanded the horse of Morse, and Morse refused to deliver him. . . .

The defendants asked the judge to rule as follows: . . . "(2) The facts disclose a partnership between the plaintiff and Willis, to own and hold the horse on joint account, for the purpose of speculation, and the plaintiff cannot maintain a count in contract against Willis, without an allegation that the partnership matters had been closed up and an ascertained balance found due." . . . The judge refused so to rule; found for the plaintiff; and ordered judgment for him for one-half of the price for which the horse was sold, with interest from the date of the sale. The defendants alleged exceptions.

C. Sewall, for defendants.

S. Lincoln, Jr., for the plaintiff.

LORD, J. There can be no doubt of the correctness of the ruling of the Chief Justice of the Supreme Court. The plaintiff and Willis were the owners as tenants in common of the horse. The facts show conclusively that the transaction did not constitute a partnership, in reference to the title to the horse. The mode of using and the expense of keeping are conclusive upon this point. Being thus tenants in common, neither party had any lien upon the share of the other for expenses incurred, either for labor done upon the horse as by shoeing, or for advertising him for sale, and Morse had no lien upon him for the keeping. Goodrich *v.* Willard, 7 Gray, 183. Even if there had been a lien, no step had been taken to enforce it. The facts find an express agreement that "neither party should sell the horse without the concurrence of the other." The sale by Morse, by the authority of Willis, was

a conversion of the part of the horse owned by the plaintiff. The sale was by the concurrent action of both defendants, and was in itself a conversion without the subsequent demand which was proved.

Exceptions overruled.

QUACKENBUSH *v.* SAWYER.

54 Cal. 439. 1880.

McKee, J. We do not regard the action in this case, as does counsel for the appellant, as an action for the settlement of a partnership account.

In substance it is alleged, in the complaint in the case, that the parties had severally advanced certain sums of money in purchasing the "circus property" mentioned in the complaint; that they then entered into an agreement that the defendant should take and keep possession of the property, and cause it to be used and employed by circus companies or managers for the joint benefit of himself and the plaintiff in equal shares; that in using or employing it for this purpose, he should make provision that the "rent or compensation" receivable for the use of the property should be first paid to him, and that, upon collecting or receiving such "rent or compensation" he should account therefor, and pay it over every month to the plaintiff, until the money which plaintiff had advanced for the purchase of the property, and interest thereon from the time of its advancement, should be paid; and after such payment, defendant should account for, and pay over to the plaintiff, one-half of said rent or compensation. And it is charged that the defendant received as "rent or compensation" for the use of the property, large sums of money, of the amount of which plaintiff is ignorant, and he prays for an accounting and division of the property.

Each allegation of the complaint is specifically denied by the answer, and a special defence is also set up. The proofs on the trial establish these facts: That in June, 1873, one Conklin was owner of the "circus property" mentioned in the pleadings, and manager of a certain troupe or company of circus performers; that by a bill of sale Conklin transferred the property to the parties in this action, as security for the payment to them of certain sums of money, which they had severally advanced to him. That they agreed with each other that defendant should take possession of the property, and transport it from place to place in the State of California, upon a performing tour, and receive or collect the income of the performances, and apply it, first of all, to the payment of money advanced by the plaintiff, and then to the payment of what he himself had advanced to Conklin.

Pursuant to this agreement, defendant took possession of the property; and, being a teamster, made a contract with Conklin for the transportation of the property, during the summer season of 1873, from

place to place in the State of California, on a performing tour under the direction of Conklin. Performances were given in various interior towns and cities of the State, at which the defendant collected or received $4,200; but he has failed and refused to account for or pay to the plaintiff any portion thereof. Upon these proofs the court below rendered judgment against the defendant for the amount of money advanced by the plaintiff to Conklin, and interest thereon from the date of its advancement.

The bill of sale to the parties made them owners of the property, Heyland *v.* Badger, 35 Cal. 404; but a mere joint ownership in personal property does not constitute the owners partners. Post *v.* Kimberly, 9 Johns. 470; Hawes *v.* Tillinghast, 1 Gray, 289. Nor did the agreement between them have that effect. A partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. § 2,235 Civ. Code. But plaintiff and defendant were not engaged in the circus business, nor did they agree to carry it on. The business belonged to Conklin alone; and in it the defendant used the joint property of himself and the plaintiff — as he was authorized to use it in the business of any other circus manager — upon the terms and conditions that *he* was to receive the income of the business from Conklin, for the payment of their claims against Conklin. Only to the extent of the income, or, as the pleader calls it, "rent or compensation," receivable by the defendant, were they at all interested in the business; but an agreement to divide the income of a business does not create a partnership; therefore, when the defendant received the income, he did not receive it as a partner, but as a trustee; and he held so much of it as was necessary to pay the plaintiff's demand against Conklin in trust for that purpose, and it was his duty to account for it to the plaintiff; failing in *that*, the plaintiff had a right to compel him to account for so much of it as came into his hands for the purpose of discharging his trust.

The character of the agreement between them, as set forth in the complaint, and that proved at the trial, made an account necessary to determine the respective rights of the parties. Gar *v.* Redman, 6 Cal. 576. And while there is some difference between the agreement as stated in the complaint, and that proven at the trial, yet the variance is not material. It is one which could not have misled or surprised the defendant to his prejudice in maintaining his defence upon the merits. Code Civ. Proc. §469; Peter *v.* Foss, 20 Cal. 590; Regan *v.* O'Reilly, 32 Ind. 14; Woolcott *v.* Meach, 22 Barb. 321. Ross, J., and McKinstry, J., concurred.

Judgment affirmed.

FARRAND *v.* GLEASON.

56 Vt. 633. 1884.

Ross, J. Was the relation between the orator's intestate and defendant that of partners or of tenants in common? This is the first question to be determined. The orator contends that it was that of partners, and the defendant, that of joint tenants or tenants in common. The defendant does not seriously insist that they were joint tenants. Their relation is manifestly to be determined from the contracts of March 1, 1876, and of July 17, 1877, and their dealings with each other in regard to the subject matter of said contracts. The subject of the contracts was real estate. Doubtless a partnership might exist for dealing in real estate. Such partnerships are, however, unusual. One of the usual elements of a partnership consists in clothing each partner with full power to buy and sell the partnership property. A perfect sale implies that which alone in real estate transactions can make the sale effective — a conveyance. It is evident that each partner in a partnership in regard to real estate cannot be clothed with the power of making a perfected sale thereof. From the nature of the property, the title must be vested either in one or more or all the partners. Those holding the title alone can convey real estate. From its nature, and the legal requirements in regard to conveying title to it, real estate alone has rarely been the sole subject matter of a partnership. It is frequently held by the partners as partnership property, when necessary for the proper transaction of the partnership business, or when taken in payment of partnership debts, or purchased with partnership funds. Then, for the purpose of closing the partnership or paying partnership debts, it is frequently treated as personal property. 1 Pars. Con. ch. 12, § 2. Mr. Washburn, in his work on Real Property, vol. I., p. 422, says: "Independent of the rights of creditors, such estate will be held by the owners as tenants in common, with all the incidents of such estate." The partners were at common law never treated as joint tenants of such real estate. It partook of the character of stock in trade, held subject to the hazard of profit or loss. By the law merchant, the right of survivorship, or *jus accrescendi*, did not attach to such real estate. Co. Lit. 182, a. Hence, from the nature of the property, the limitations of the agency of each partner in making a perfected sale, courts are not inclined to imply a partnership where the subject matter is real estate alone. Looking into the contracts of March 1, 1876, and July 17, 1877, nothing is found indicative of a clear intention to form a partnership. No partnership, nor partnership name, nor partnership business, nor capital is agreed upon. The parties agree to purchase certain property and fit it up for certain purposes, and to be at equal expense in doing it, and to share equally the profits that may arise from selling or leasing the property. They do not contemplate the carrying on of any business upon, or in connection with,

the property so to be purchased. Each was in his own way to furnish his share of the funds necessary to accomplish the purposes of the contracts. In fitting up the property, as required and contemplated by the contract of March 1, 1876, each bought upon his individual credit. He had no right to pledge, and did not attempt to pledge, the credit of the three for such purchases. The contract of July 17, 1877, recognizes the fact that they have not contributed equally to the purchase and fitting up of the property, that their contributions have been made as individuals, and gives the larger contributor or contributors thereto a lien upon the share of smaller contributor or contributors, and provides that the first profits shall be applied to equalizing the several shares. It speaks of the several owners as shareholders and not as partners. All the provisions of these contracts, as well as all the conduct of the parties, are consistent with a tenancy common in the property, while they lack many of the distinctive elements and characteristics of a partnership therein, if not absolutely inconsistent therewith. We think that the defendant's contention must prevail in regard to the relation of the orator's intestate to the defendant and the property in question, under these contracts, and the interpretation put upon them by the conduct of the parties. . . .

Decree reversed.[1]

CHERRY *v.* STRONG.

96 Ga. 183 : 22 S. E. 707. 1895.

LUMPKIN, J. An affidavit was made by Cherry for the purpose of foreclosing an alleged special lien in his favor, as a laborer, against Strong, "agent for Mrs. A. A. Strong." An issue was formed, and at the trial the defendant moved to dismiss the plaintiff's case upon the ground that the facts set forth in his affidavit showed that he was a partner of the defendant, and not a mere laborer. This motion was sustained, and the plaintiff excepted.

The material portions of the affidavit were, in substance, as follows: On the 28th of October, 1892, Cherry, the deponent, contracted with Strong, as the agent of Mrs. Strong, to cultivate her lands for the year 1893. The same were to be planted in corn, cotton, etc. Strong, as agent, was to furnish 140 acres of land, 4 head of horses or mules, a wagon, farming utensils sufficient to cultivate the land, 500 bushels of corn, 1200 bundles of fodder, and "supplies for the laborers whom he was to hire for three of the ploughs run on said farm." Cherry "was to take charge of the four ploughs, and run them together; and he was to manage the whole farm, and keep all the fences in repair, . . . and

[1] Only that part of the opinion which deals with the question of partnership is reprinted.

do all that was required to be done by a farm manager, — for which services he was to have one-fourth of what was made on said farm." The affidavit then proceeded to state that Cherry faithfully performed and completed his contract of labor; set forth the amounts of the crops made, the portion and value thereof to which Cherry was entitled, the amount he had received, and the balance still due him "for said labor performed by affiant as aforesaid." Demand and refusal to pay, etc., were also alleged.

The only question made before, and passed upon by, the trial court, was whether or not, under the facts alleged, Cherry was a partner of Mrs. Strong. No question was raised as to the insufficiency or defectiveness of the plaintiff's affidavit in other respects; and therefore, in deciding the case, we have confined ourselves strictly to the issue of partnership or no partnership. If the plaintiff's affidavit does not, with sufficient clearness and distinctness, allege that he actually performed manual labor, and was therefore entitled, as a laborer, to a lien upon the defendant's property, the defect, upon being pointed out, would have been curable by amendment. We therefore deem it fair to decide only the one question above indicated, and leave open such other questions as may hereafter arise in the further progress of the case. We are quite clear that under the facts presented the contract alleged in the plaintiff's affidavit did not constitute a partnership between the parties. There are numerous decisions of this court in support of this conclusion. In Holloway *v.* Brinkley, 42 Ga. 226, this court held that where there was a contract between a freedman and a landowner to make a crop for one year, by the terms of which the latter was to furnish the land and stock, and the freedman to work the same, and receive for his labor one-half of the crop, no partnership between the parties resulted. This case was cited approvingly in Smith *v.* Summerlin, 48 Ga. 425, where a very similar contract was under consideration, and the same doctrine was announced. The case of Gurr *v.* Martin, 73 Ga. 528, is also very much in point. By the terms of the contract between these parties, Martin was to furnish Gurr a farm, stock to cultivate the same, implements, cotton seed, and guano, and also to advance certain supplies for Gurr's support. Gurr was to furnish the necessary labor to cultivate the farm, "and feed for said labor;" to make, gather, and house the crops, repair fences, "and perform such other service as is usually done on a farm," — for all of which he was to receive one-half of the crops made, gathered, and housed by him, and also one-half of certain hogs. Under these facts, it was held that the contract did not constitute a partnership between the parties. And see, also, Almand *v.* Scott, 80 Ga. 95. In view of the cases above cited, and others which might be cited to the same effect, there is no difficulty in holding that in the present case no partnership existed. The contract simply contemplated that Cherry was to be paid for his services one-fourth of what was made upon the farm. The fact that his compensation would vary according to the size and value of the

crops produced would make no difference, for it might well be stipulated that the measure of his wages should depend upon the diligence and success with which he performed his work. If he really performed manual labor in the production of the crops, he was as much a laborer as though his wages had been payable in money. He had no joint interest in the property used in the business, nor a joint interest in its profits and losses, but the price of his services was simply to be measured by the results of his labor. The court erred in dismissing the plaintiff's case on the ground stated.

Judgment reversed.[1]

ASH ET AL. v. GUIE.

97 Pa. St. 493. 1881.

ASSUMPSIT by Guie against Ash and over a hundred others alleged to have been "lately trading as Williamson Lodge, No. 309, A. Y. M.," for money loaned by the plaintiff below to the defendants, as evidenced by a certificate in writing, which acknowledged that Williamson Lodge aforesaid was indebted to plaintiff in the sum of $100, payable in two years from Nov. 11, 1870, with interest. The certificate was signed by the worshipful master and wardens of the lodge, who also "caused the seal of the said lodge to be affixed;" and the signatures and seal were attested by the secretary of the lodge. The money was borrowed and used for the construction of a temple which was owned by the lodge. Verdict was directed for the plaintiff against the defendants on the theory that the members of the lodge were partners.

[1] In Donnell v. Harshe, 69 Mo. 170, 172 (1877), Napton, J., said: "It is essential to a partnership that there be a community of interest in the subject of it, and this community of interest must not be that of mere joint tenants or tenants in common. When the effect of the agreement is, as propounded in the instruction, that one should occupy and cultivate the farm of another, and the crops should be divided equally between the occupant and the owner, no partnership is necessarily intended or created. . . . This is probably a very common mode of leasing farms in this State, but the proprietor and occupant might be equally surprised to be informed that they were partners."

In Reynolds v. Pool, 84 N. C. 37 (1881), it was held that the following agreement created a partnership between the parties: "I agreed with McPheeters" (the landowner) "to farm for the year 1878 on these terms: He was to furnish the outfit and the land: I was to hire the hands and superintend the working of the crop: he was to provide money to pay the hands and carry on the business; for one-half of which, as well as for the like proportion of the hire and costs of feeding the mules and horse, he was to be repaid by having the amount applied in reduction of his indebtedness to me previously incurred and we were to divide the profits." The court declared it to be a partnership "between the parties themselves, because the one of them does not look to the other personally for restoring to him his capital, or remunerating him for his labor, but each looks to the assets or joint fund for these purposes, and ascertains his interest by taking an account of the concern;" following Holt v. Kernoldle, 1 Ired. L. 199 (1840), which was based upon Waugh v. Carver, 2 H. Bl. 235.

R. E. Monaghan (with him *P. F. Smith*), for plaintiff in error.

R. J. Monaghan, for defendants in error.

TRUNKEY, J. One of the defendants, called by plaintiff, testified: "The full title of our lodge is Williamson Lodge, No. 309, F. and A. M.; F. and A. M. means Free and Accepted Masons; the purposes of our lodge are charitable, benevolent, and social." This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs it was held to be a common partnership. A partnership has been defined to be a "combination by two or more persons of capital, or labor, or skill for the purpose of business for their common benefit." It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence, voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Parson on Part., 6, 36, 42.

A benevolent and social society has rarely, if ever, been considered a partnership. In Lloyd *v.* Loaring, 6 Vesey, 773, the point was not made, but Lord Eldon thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd Fellows, an association of persons for purposes of mutual benevolence, erected a building which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds, it was said that, as respects third persons, the members were partners, and that lien-creditors who were not members were entitled to preference as against the liens of members. Babb *v.* Reed, 5 Rawle, 151. Had the members been called joint tenants of the real estate, the same principle in the distribution would have applied. In Flemyng *v.* Hector, 2 M. & W. 172, Lord Abinger stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right of property for the whole, and in any ordinary transaction may bind the partnership by credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club, in the case before him, he says: "It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for

the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his co-tenant. Thus, one of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred. Ricketts *v.* Bennett, 4 M. G. & S. 686.

Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. The proof fails to show that the officer or a committee, or any number of the members, had a right to contract debts for the building of a temple which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking, or subsequently ratified it. Those who participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowed money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agents' acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade.

This unincorporated association had a seal which the officers were authorized to use for certain purposes. Some of those who engaged in the business of borrowing money directed it to be affixed to the certificate of indebtedness. All who did, adopted it as their seal for the specific purpose. It was not the seal of a corporation, nor intended as such. The parties borrowed the money in the name of the lodge, and gave the certificate in same name, and adopted a common seal. They cannot repudiate it in good faith to the lender. He loaned the money on a sealed instrument, in many respects better than a simple contract. Those who advised affixing the seal should be held the same as their officers who signed the certificate. Were the members partners, without evidence of agreement between them that the seal should be affixed to contracts, those not assenting to its use in that way would not be bound by a sealed instrument, though given for a debt for which all were liable. Schmertz *v.* Shreeve, 12 P. F. Smith, 457. The learned judge was right in ruling that the certificate was a sealed instrument, but not, under the evidence, in holding that it was authorized by all the members. . . .

Without noticing seriatim the two dozen assignments of error, we

have endeavored to express our opinion on every material point raised by them. This writ is by all the defendants, and they contend that none are liable. That the money was fairly loaned by the plaintiff and used by the borrowers, is not disputed. If any of defendants had no part in the borrowing, either by previous assent and procurement, or by subsequent ratification, they have a meritorious defence, and the grounds on which the judgment is reversed will avail them. The question is one of fact, and must be determined by the jury from the evidence. It is difficult to conceive of a meritorious defence in those who actually got the money, some of whom signed the certificate, and others actively participated in the giving of it. They have a legal right to refuse payment until judgment be recovered according to law. But they cannot complain if the plaintiff fails to include every one in the action who is liable, or fails to discover proof against every one included. In the nature of the case, it is difficult for the plaintiff to determine in advance the precise individuals who are liable, though he be sure of some of them; and the court below has not been, and will not likely be, slow to allow necessary amendments, authorized by the statutes.

Judgment reversed, and venire facias de novo awarded.

BATARD v. HAWES.

2 Ellis & Blackburn, 287. 1852.

PLAINTIFF, defendant, and several other persons were a provisional committee working together to form a railway company. In this capacity they contracted a debt in respect of the scheme; the creditor sued plaintiff, who paid the entire debt, and this suit was brought for contribution. The trial judge directed a verdict for the plaintiff.

Shee, Serjt., moved for a new trial on the ground that the plaintiff and defendant, being members of a provisional committee, had many cross liabilities in respect of the scheme, and that it was a misdirection to direct the jury to find a verdict for contribution in respect of one of them.

LORD CAMPBELL, C. J. The objection is not tenable. If provisional committee men were partners, the action would not lie; but it has been solemnly decided that they are not, as partners, liable on all transactions entered into by one of them, but that the liability in each case depends on the actual contract made, taking each separately as an isolated transaction, and as if that was the only contract made. I think there is no third class known to the law; either they are partners or they are not: and if they are not, the rights arising on one contract cannot be voided because there are others.

WIGHTMAN, ERLE, and CROMPTON, JJ., concurred.[1]

[1] In Holmes v. Higgins, 1 B. & C. 74 (1822), Abbott, C. J., declared that the members of such a committee "were partners;" but in Reynell v. Lewis, 15 M. & W. 517

MARTIN v. BAIRD.

175 Pa. St. 540: 34 At. 809. 1896.

PLAINTIFF,[1] being the owner of an undivided one-fourth interest in the Riverside Hotel property, at Cambridgeboro, Pa., united with his co-owners in a sale and conveyance thereof to defendant for the sum of $75,000. At the same time, defendant expressed his willingness to form a partnership with plaintiff for the purpose of carrying on the hotel business with said property, and agreed to convey to plaintiff a one-fourth interest in said property for $18,750, upon the formation of a partnership, by articles of agreement in writing, signed by the parties. After the sale was made, but before the deed of the premises was delivered, the plaintiff and defendant went to Cleveland with reference to the interest of the contemplated partnership and the prosecution of the business thereunder, and there arranged to have policies of insurance to a large amount, then on the property, transferred in consequence of the sale. A statement was made to the insurance agent having charge of the business that a partnership was in contemplation between plaintiff and defendant; and it was decided by the insurance agent that the policies ought to be transferred to William Baird and J. H. Martin, doing business as William Baird & Co., as their interests might appear. A consultation was also had with different persons in Cleveland, with reference to the employment of a purveyor for the hotel. On the date of the delivery of the deeds to the defendant, the policies of insurance were transferred as arranged for at Cleveland. On the day of the delivery of the deeds of the property to the defendant, and after their delivery, it was arranged that a deed should be prepared from the defendant to the plaintiff for one undivided fourth of the property that day conveyed to the defendant. The plaintiff's interest in the real estate conveyed to defendant was covered in part by mortgages, which the defendant assumed to pay, as will appear by reference to the articles of agreement. After the delivery of the deed by the plaintiff to the defendant, the plaintiff made a payment on one of the mortgages against the interest in the property which he had conveyed to the defendant, with the knowledge of defendant, in anticipation that a conveyance would be made by the defendant, and the partnership formed in accordance with the negotiation of the parties. From the 5th of February the business was conducted under the partnership name of William Baird & Co. Books were opened in that name; the letter heads and envelopes were stamped with that name; and an entry was made in the journal of William Baird & Co.:

(1846), this view was rejected. Said Pollock, C. B., "Such an intended association constitutes no agreement to share in profit or loss, which is the characteristic of a partnership. It would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act" as provisional committee men.

[1] The statement of facts has been abridged.

Real estate	$53,000	
Furniture and fixtures	12,000	
Bottles	1,500	
Carriage and road stock	3,000	
Provisions	1,000	
Bedding and linen	2,900	
Drying room and machinery	464	
Tools and chattels	100	
Fuel	136	
		$75,000
To Wiliam Baird, three-fourths	$56,250	
To J. H. Martin, one-fourth	18,750	
Total	$75,000	

Investment of William Baird & Co. on commencing hotel business in Hotel Riverside, Cambridgeboro, February 5, 1895.

Interest in partnership and profits to be had as follows:

William Baird, three-fourths	$56,250
J. H. Martin, one-fourth	18,750

The entries were so made and the business so conducted in anticipation of the formation of the partnership herein above referred to, and the conveyance to plaintiff of the undivided one-fourth of the property.

At different times after February 5, 1895, plaintiff and defendant endeavored to agree upon and reduce to writing the terms of the partnership, and a memorandum was prepared by the parties, and sent to an attorney in Pittsburg, to be reduced to proper legal form.

The plaintiff was not satisfied with one or two provisions of the contract, and the paper was not therefore signed. The plaintiff was at this time, and had been since the 5th of February, 1895, in charge of the baths and medical business of the establishment. On February 8th a power of attorney was executed by the plaintiff, with the knowledge of the defendant, authorizing W. E. Kimberling to sign checks and transact other business for William Baird & Co.

March 21, 1895, the parties having failed to agree upon the terms of partnership, the defendant ejected the plaintiff from the property, and has since prevented him from having access thereto.

(The plaintiff having brought a bill in equity to enforce a trust as to the undivided one-fourth of said property and to secure an account of the partnership alleged to have existed in the said hotel business, the trial court decided that no trust existed in plaintiff's favor, and continued.) The plaintiff's demand for an account is based upon the allegation of an existing partnership. The allegation of partnership, however, is based upon the assumption of a title in trust by the defendant for the plaintiff. The evidence not being sufficient to support a decree of trust, the allegation of partnership necessarily fails. The bill charges that an agreement of partnership was formed at the time when the memorandum of January 28, 1895, was executed by the

defendant, and that it was a part of the agreement under which the resulting trust is alleged. It seems clear, however, from all of the evidence, that the agreement between the plaintiff and the defendant with reference to the partnership was that a partnership should be formed in the future. That it was not so formed at the time when the plaintiff and defendant went to Cleveland, after the 28th of January, is evident from the plaintiff's testimony. In the negotiation in reference to the transfer of the policies of insurance, it clearly appears that the parties had in mind, not an existing partnership, but a "proposed" partnership, and this tentative condition of things existed up to the period when the parties finally disagreed with reference to the articles of partnership. The entries of the bookkeeper in the books of the hotel, the dating of the letter heads, the transfer of the policies of insurance, and the other acts referred to in the evidence, indicating a recognition of the partnership, are not inconsistent with this view of the case. The parties intended to form a partnership, and these acts were performed in view of an apparently confident expectation of each of the parties that there would be no difficulty in arranging the details of a contract of partnership. Having failed so to do, however, no partnership existed, and the plaintiff is not therefore entitled to an account.

The defendant tendered to the plaintiff the amount due under the terms of the articles of agreement, including the amount which the plaintiff had paid to apply on one of the mortgages which was an incumbrance upon the property at the time defendant purchased it. The balance of the purchase money is applicable upon these mortgages in accordance with the provisions of the articles of agreement. The plaintiff has therefore suffered no prejudice, and is entitled to and can at any time receive the amount due him from the property. There does not therefore appear to be any such equity in the case presented by the plaintiff as warrants the relief sought in the prayer of the plaintiff's bill. It is therefore dismissed, at the cost of the plaintiff.

Samuel S. Mehard and *Pearson Church*, for appellant.

George F. Davenport, *P. C. Knox*, and *Shiras & Dickey*, for appellee.

PER CURIAM. After a careful examination and study of the record in this case, we are convinced that the findings of fact and conclusions of law contained in the opinion of the learned court below are correct, and should be sustained. While it is apparent that the parties intended to form a partnership, it is manifest that it was a partnership to be formed in the future. It is equally clear that, in point of fact, the partnership never was formed. The negotiations to that end were never completed, and did not reach to an actual agreement. Without going into details, it is sufficient to say that we approve of the findings of fact and law as expressed in the opinion; and, upon those findings, we affirm the decree.

Decree affirmed, and appeal dismissed, at the cost of the appellant.

§ 4. Joint-Stock Companies.

CARTER et al. v. McCLURE et al.

38 S. W. 585: 98 Tenn. —. 1897.

Beard, J. The bill in this cause was filed by complainants, as creditors of McClure, Lucas, & Co., seeking to hold the defendants liable for the debts of that concern, upon the theory that it was a commercial firm, of which defendants were members, at the time of the creation of these debts. The facts, so far as they are important in the decision of this case, and as they have been found by the Court of Chancery Appeals, are: That these defendants, with others who are not sued, all members of an alliance lodge in the town of Huntland, in this State, entered into an agreement among themselves to raise a sum of money which, it was assumed, would be sufficient to establish a co-operative store in that place. This agreement was reduced to writing, and the names of the parties in interest were by them affixed to it, and over against his signature was placed the amount which each subscriber obligated himself to contribute to this joint enterprise. This agreement is in words and figures following, to wit: "Huntland, Tenn., Dec. 21, 1888. We, the undersigned, agree to pay to the directors, to be elected, the sum annexed to our respective names, by the first of January, 1889, for the purpose of establishing a co-operative store at Huntland, Tennessee. We further agree that the said money remain in the business for at least five years from beginning, unless two-thirds of the stockholders agree to discontinue the business in a shorter time. We further agree that three of the stockholders be elected annually as directors, to have full control of the stock hereunto subscribed. It is further agreed that the directors act in conjunction with R. W. McClure, who is a stockholder to the amount of $2,050, and who is to be the principal salesman, and in the transaction of all business between the said McClure and directors, the directors are to be regarded collectively or as a unit, and the said McClure as a unit."

After the execution of this paper, the three directors provided for in it were duly chosen, and into their hands the subscribers paid the several sums they had agreed to contribute. These sums, aggregating $590, were turned over by the directors to Mr. McClure, who, adding the amount of $2,050, which he had agreed to place in the venture, purchased a stock of goods, and opened up a co-operative store in the name of R. W. McClure & Co., this being the business name agreed upon by McClure and the three directors. No incorporation ever took place, nor was such ever intended by these parties.

The main purpose of the defendants, in entering into this business, was to avoid what they deemed to be the extortion theretofore practised upon them in the sale of goods by the merchants of the

country. While not embodied in their writing, yet one of the terms of the contract, and the one which chiefly, if not altogether, induced all the subscribers (save, no doubt, McClure) to become interested in this enterprise, was that they were to purchase such goods as they might require from the stock in this store at a profit not exceeding ten per cent above cost; and these directors were chosen as their representatives, especially to look after McClure, who was the largest shareholder, as well as manager, and see that he kept faith with the subscribers in this matter. While the defendants, styling themselves in their written agreement as "stockholders," took no active personal control of the concern, yet they manifested a lively interest in its success. In addition to giving it the benefit of their own patronage, they were zealous in commending it to their neighbors.

At the end of the first year one Mosely desired to purchase an interest in the business. He, however, was not a member of the "alliance," and, organized as this enterprise was, in line with or under the inspiration of that movement, it was necessary that he become such before he could be allowed to make such purchase. In order to qualify him to this end, the rules of the "lodge" to which these defendants belonged were suspended, and at one meeting he was admitted to the privilege of full fellowship with them. He contributed $2,000 to the capital of the concern, and its name was changed to McClure, Mosely, & Co. At the end of another term of twelve months Mosely sold out his interest to one Lucas, and thereafter the enterprise was conducted in the name of McClure, Lucas, & Co., until insolvency overwhelmed it with disaster. The claims of complainants accrued during the existence of and against this latter concern. In addition to these changes in the organization of and style of the business, two deaths occurred among the original subscribers, — one of them before, and the other after, the creation of these debts. This latter death, however, can in no way affect this controversy, and will, therefore, not be further noticed.

Upon this state of facts it is insisted for the defendants — First, that this undertaking was in no sense a partnership, and that they did not sustain the relation of partners to either R. W. McClure & Co., Mosely, McClure, & Co., or McClure, Lucas, & Co.; secondly, if, however, they are mistaken in this broad proposition, then that they were only partners in the firm of R. W. McClure & Co., and that all partnership relation and liability, on their part, were terminated or dissolved by the various changes already adverted to, and long prior to the creation of complainants' debts. The chancellor and the Court of Chancery Appeals held both these contentions against the defendants, and the case is now before us on an appeal from the decree of this last-named court.

1. Were those parties engaged in a partnership enterprise? All of the defendants earnestly disclaim any purpose of entering upon such an undertaking. While, as has been stated, the prime motive

of these parties was to organize a mercantile establishment where there various needs would be supplied at reasonable figures, yet they confess that, outside of this, they expected to share in any profits earned by it in proportion to the respective amounts contributed by them. These amounts were small, yet they were to serve as a basis for such distribution of profits. It is no doubt true that the defendants did not contemplate a partnership, and each supposed that he was simply taking a share in a joint-stock enterprise, in which all he risked was the small sum paid for such share; yet it is for the law to determine, on the facts already given, whether a partnership was created, with all its attending liabilities. In Mallory *v.* Oil Works, 86 Tenn. 598, is quoted approvingly the definition of a partnership as given by Judge Story. "A partnership," says the former writer, "is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." Story, Partn. § 2. The facts found by the Court of Chancery Appeals, a general outline of which is given above, disclose the constituent elements of a partnership as required by this definition. It is a case where these parties have embarked their money "in lawful commerce, . . . with the understanding that there" should be a division of profits earned. In addition to this, they have taken a firm name, and thus have advertised themselves to the world as a commercial partnership. Calling their contributions to the capital of this business a "subscription for stock," and taking certificates for their payments from the company as a joint-stock company, it not being incorporated, cannot alter their liability. "There is no intermediate association, or form of organization, between a corporation and a partnership, known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint-stock company is treated and has the attributes of a common partnership." 1 Bates, Partn. § 72. And Judge Story says that, "In joint-stock and other large companies which are not incorporated, but are a simple, although an extensive, partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate commercial partnerships." And such has been the conclusion of the courts wherever the character of joint-stock companies similar to the one in question has been passed upon, so far as our examination has disclosed. At least such was the holding in Hodgson *v.* Baldwin, 65 Ill. 532; Kenyon *v.* Williams, 19 Ind. 44; Manning *v.* Gasharie, 27 Ind. 390; Beaman *v.* Whitney, 20 Me. 413; Farnum *v.* Patch, 60 N. H. 294. The Supreme Court of New Hampshire, in this last cited case, have delivered an able, exhaustive opinion upon the law of partnership as it applies to an association like the one in question, and we content ourselves with what we have already said, and by making special reference to that opinion. In the

light of these authorities, we think there can be no doubt that these parties were partners in the firm of R. W. McClure & Co.

2. We think it equally clear, on the facts of this case, and in view of the legal principles applicable to them, that there was no termination of the partnership enterprise resulting from the changes occurring during its progress, by the introduction and subsequent withdrawal of Mosely, and the accession of Lucas or his capital to it, or the death of one of the original subscribers intermediate between the start of this business and the final insolvency of McClure, Lucas, & Co.; that, through all these changes, the defendants' relations remained as fixed by themselves in the beginning; and that they are liable as partners for the debts sought to be enforced in this cause.

This conclusion we rest on two grounds: First. It is found by the Court of Chancery Appeals to be a fact that these defendants were members of the alliance lodge that, by a suspension of its rules, hurriedly qualified Mosely, so that he might bring his capital and his name to the aid of this joint undertaking. They do not claim to have been ignorant of this proceeding, or to have offered any opposition to it, either in or out of their lodge, or that they made any protest against his accession to the business. On the contrary, their zeal for the success of the movement continued undiminished. And so with regard to the withdrawal of Mosely and the introduction of Lucas in his room and stead. The record shows consultation with quite a number of these defendants as to the advisability of this change, and an agreement with them in regard thereto, and acquiescence, at least by silence, on the part of the remainder. All these parties through the various changes in the personnel of the organization, by death and purchase, and in the firm name under which the business was carried on, not only stood by and watched the movements of the concern, as one in which they had a part, but they made no claim of dissolution by reason thereof until confronted by the claims of these complainants. It was then too late. For, conceding that either one of these acts might have been availed of by the defendants as working a dissolution of their partnership, yet, at their election, they might waive this effect.

Second. The nature of this enterprise repels the idea that it was in the contemplation of the parties that either death or any transfer of shares should work a dissolution of the business. Not only was it to continue for five years, "unless two-thirds of the stock-holders 'agreed' to discontinue the business in a shorter time," but the shares of the stockholders were transferable. Says Mr. Bates in his work on Partnership (volume 1, § 72): "The fact of transferable shares makes such an association different, not merely in magnitude, but in kind, from ordinary partnerships, because not based upon mutual trust and confidence in the skill, knowledge, and integrity of every other partner. Hence a sale of his shares by a member, the shares being transferable, is not a dissolution. Death of a member

is not a dissolution, if such was the intent and the character of the association, in that the shares are transferable, and it is governed by officers, and is in the form of a corporation, is evidence of such intent." What the text writers and the opinions of many courts call the *delectus personarum* an element in an ordinary commercial partnership, is lacking when a partnership assumes the character of a joint-stock company with transferable shares. 2 Bates, Partn. § 581; Bank *v.* Dean, 124 Mass. 81; Walker *v.* Wait, 50 Vt. 668; McNeish *v.* Oat Co., 57 Vt. 316.

It follows that the assignments of error upon the decree of the Court of Chancery Appeals, in the particulars above indicated, must be overruled. The assignments of error upon the court's decree as to the Lipscomb claim are disposed of only.

The decree of that court is in all things affirmed.

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§ 4. Defectively Incorporated Associations.

McLENNAN ET AL. *v.* HOPKINS.

2 Kansas Court of App. 260: 41 Pac. 1061. 1895.

Garver, J. Minnie Hopkins, as assignee of Smith & Hopkins, brought this action against the plaintiffs in error to recover the sum of $761.54, alleged to be due on account of a deposit of money made by Smith & Hopkins in the Bank of Dorrance, which was owned and controlled by plaintiffs in error, and for which deposit it is claimed they were liable as partners. The defendants answered the petition by a verified answer, consisting of a general denial, and the further allegation that "all of the dealings and transactions stated in said plaintiff's petition were had, if at all, with the Bank of Dorrance, the same being a duly organized and existing corporation under the laws of Kansas." No reply was filed to this answer, but a trial was had the same as if issue had been formally joined upon all material facts in dispute, and judgment was rendered against the defendants (now plaintiffs in error), holding them individually liable as partners for the full amount of the claim.

The record shows that about April, 1886, A. N. McLennan and his co-defendants, with others, agreed to establish a bank for the transaction of a banking business at Dorrance, Kan., with a capital of $50,000, divided into shares of $100 each. Pursuant to such agreement, the several parties interested signed a paper, each agreeing to take certain shares of stock. Certain ones of their number were chosen to act as directors, and W. Z. Smith was elected president, and L. B. Hail, cashier. The full amount of the capital stock was subscribed, and two assessments, of 10 per cent each, paid in by the subscribers shortly after the subscriptions were made, and thereafter a dividend of the profits of the business was made from 2 to 5 per cent, which was

applied by the bank as a further payment on the stock. A seal was provided and used, and a regular banking business of discount and deposit was carried on under the name of the Bank of Dorrance until December, 1889. About the time of the organization of the bank, under the direction of the president, articles of incorporation of some kind were drawn up, the record not disclosing what such articles contained; neither does it show by whom they were signed, though the evidence tends to show that they were signed by some of the directors, and thereafter delivered by the president of the bank to the cashier. No articles of incorporation or statement of any kind concerning the organization of said bank were filed or recorded in the office of the register of deeds of Russell County, where said bank was located, nor any copy or other instrument filed in the office of the secretary of state. With the exception of the president, none of the stockholders seem to have given any attention to the incorporation of the bank, and allowed the business to be carried on, believing that it was duly incorporated, and not intending at any time to assume any liabilities other than such as might attach to them as stockholders in a corporation organized under the laws of Kansas. Smith & Hopkins, in their dealings with the bank, regarded it as a corporation, and knew nothing to the contrary, until about the time of the failure of the bank in 1889, and after the deposits sought to be recovered were made.

The main question to be decided in this case is whether one having a claim as depositor in this bank for the recovery of an unpaid deposit can hold the several persons who own the bank individually liable as partners, or whether, having dealt with the bank as a corporation, he is estopped from claiming any other than a corporate liability. It is contended for plaintiffs in error that the bank was at least a *de facto* corporation, and that one dealing with it as such cannot, in this collateral way, attack the validity or regularity of its incorporation.

Were the defendants liable as partners? It must be conceded that they were jointly interested in the business carried on in the name of the Bank of Dorrance, and jointly concerned, though perhaps in different degrees, in the profits and losses of that institution. The business for the conduct of which the bank was organized was such as could very properly and legally be carried on by one or more persons, without regard to laws for the incorporation of such enterprises. Incorporated banks do not have, either in law or in fact, an exclusive right to engage in the business of receiving deposits, loaning funds, selling exchange, and the like, such as was conducted by the Bank of Dorrance. Being thus jointly engaged in such business, there is no presumption of individual non-liability. Persons engaged in business as a corporation, whether their charter rights and privileges are conferred by a special or general law, are relieved from individual liability for the acts of the association with which they are connected. The law pertaining to incorporated bodies clothes the individual with an immunity from liabilities which otherwise would fall upon him. Hence it

follows that to enable one to avoid such individual liability for a transaction with which he is connected, on the ground that it was the act of a corporation in which he was only a stockholder, it must appear that such steps have been taken to incorporate as will give those concerned in it, at least, a legal semblance of corporate existence. When the question arises collaterally, as it does in this case, it is not necessary that the various steps prescribed by law should have been fully and regularly taken, or that the corporation should exist *de jure;* it is sufficient that enough has been done to make it a corporation *de facto.* To this extent, we agree with counsel for plaintiffs in error.

The question still remains, was the Bank of Dorrance a corporation *de facto?* We think not. It is difficult, and perhaps unnecessary, to attempt to reconcile the many decisions bearing on this question. Between some of them there is an irreconcilable conflict, so that, when we come to determine what is a *de facto* corporation, we are met by a diversity of authority. The rule recognized by the Supreme Court of this State is thus stated by Mr. Justice Brewer in Pape *v.* Capital Bank, 20 Kan. 440: "When parties have associated themselves together for the purpose of organizing a corporation under a general law, and have proceeded in good faith to take all the steps supposed necessary to complete such incorporation, and on the faith thereof engage in business as a corporation for a series of years, a party who has repeatedly dealt with them as such corporation will not, when sued on a note and mortgage held by it, be permitted to show, as a defence to the action, that there was some mere technical omission in the steps prescribed for incorporation. The corporation is one *de facto;* and only the State can then inquire — and that in a direct proceeding — whether it be one *de jure.* . . . There must in such cases be a law under which the incorporation can be had. There must also be an attempt in good faith on the part of the incorporators to incorporate under such law. And when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the State, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defence to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action." The attempt to incorporate, referred to in that case, must be something more than the mere physical organization, or formal arrangement into a working force, of the promoters of the enterprise. Something must be done beyond the mere transaction of business in the manner and form usually adopted by corporations. There must also be something more tangible and effective than a mere mental operation in the direction of what is intended. The steps taken and the attempt made must, to some extent and in some degree, have resulted in the effecting of those things which the law designates as a prerequisite to a corporate existence, however informal and irregular such proceedings and results may be. Had the

articles of incorporation been prepared and recorded or filed as required by the statute, and the organization had been otherwise effected as shown in this case, no question could be thus raised as to the fact of a corporate existence because of defects and irregularities in the attempted organization or in the articles of incorporation. But, an entire failure on the part of the officers of the bank to prepare and execute the certificate or articles of incorporation required by law, and an entire failure to file a certificate or statement of any kind whatever in the office of the register of deeds of the county, or in the office of the secretary of state, left the organizers of this bank without a shadow of legal corporate existence. There was no substantial compliance with the law, and there could be no *de facto* corporation. We are supported in this conclusion by the following cases: Bigelow *v.* Gregory, 73 Ill. 197; Kaiser *v.* Bank, 56 Iowa, 104; Sheble *v.* Strong, 128 Pa. St. 315; Hill *v.* Beach, 12 N. J. Eq. 31; Stout *v.* Zulick, 48 N. J. Law, 599; Abbott *v.* Smelting Co., 4 Neb. 416; Society Perun *v.* Cleveland, 43 Ohio St. 481; Railroad Co. *v.* Cary, 26 N. Y. 77; Hurt *v.* Salisbury, 55 Mo. 310; Smelting Co. *v.* Richards, 95 Mo. 106; Whipple *v.* Parker, 29 Mich. 369. In the cases cited, there was a failure on the part of the organizers of the claimed corporation to do some act, generally the neglect to file the articles of association or incorporation, made by the statute a prerequisite to corporate existence; and the rule clearly and forcibly laid down is that in such cases there is no *de facto* corporation, and that the claimed corporate existence may be attacked collaterally. An exception to this rule exists in cases where one is sued by the alleged corporation upon a contract in which the corporate capacity is recognized. To this effect are Jones *v.* Foundry Co., 14 Ind. 89; Meikel *v.* Fund Soc., 16 Ind. 181; Irrigation Co. *v.* Warner, 72 Cal. 379; Massey *v.* Building Ass'n, 22 Kan. 379. In those cases another principle is invoked, which does not permit a party to avoid the obligation of his contracts upon the mere technical objection that the party with whom he contracted had not the legal capacity to enter into the contract of which he has had the benefit. The distinction between that class of cases and the case under consideration is obvious. It is equally well settled that a substantial, though imperfect and irregular, compliance with the law, in a *bona fide* attempt to incorporate, followed by a user of corporate rights, will create a *de facto* corporation, as the corporate existence cannot be collaterally questioned by one dealing with it as a corporation. To this effect are Baker *v.* Neff, 73 Ind. 68; Williamson *v.* Ass'n, 89 Ind. 389; Rice *v.* Railroad Co., 21 Ill. 93; Railroad Co. *v.* Cary, 26 N. Y. 75; Mining Co. *v.* Woodbury, 14 Cal. 424; Oroville, etc., R. Co. *v.* Plumas Co., 37 Cal. 361; Swartwout *v.* Railroad Co., 24 Mich. 389.

We think the facts shown by the record justified the trial court in holding the plaintiffs in error liable as partners for the debts of the bank.

The judgment will be affirmed. All the judges concurring.[1]

[1] A part of the opinion relating to a question of pleading has been omitted.

CHAPTER II.

PARTNERSHIP AS TO THIRD PERSONS.

§ 1. Test of Sharing Profits.

BLOXHAM et al. v. PELL et al.

2 Wm. Bl. 999. 1775.[1]

This was also a partnership for seven years between Brooke and Pell; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited that Brooke, being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at five per cent, which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership, it was a crime. And it shall not lie in the defendant Pell's mouth to say, "It is usury, and not a partnership."[2]

GRACE v. SMITH.

2 Wm. Bl. 998. 1775.

De Grey, C. J., reported that this was an action brought against Smith alone as a secret partner with one Robinson (*vide* Abbot and Smith, *ante*, p. 947), to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of March, 1767, Smith and Robinson entered into partnership for seven years, but in the November afterward, some disputes arising, they agreed to dissolve

[1] Reported in the argument of plaintiff's counsel, in Grace v. Smith, 2 Wm. Bl. 998.

[2] "This view of the transaction had the merit of apparently holding the parties to their bargain; but, in truth, the bargain to which they were held was very different from that which they themselves had contemplated; and by treating such transactions as partnerships and not as loans, an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove." 1 Lind Par. 5th Eng. Ed., 16.

the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. That Smith was to have back £4,200 which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,000, part of this £5,200, or let it remain in his hands for seven years at five per cent interest, and an annuity of £300 per annum, for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by the way of interest and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. That on the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one, viz., £5,200 due to him on the dissolution of the partnership, £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship; in all £7,000, for which Robinson gave a bond to Smith. That on the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

Davy, for the plaintiff.

Grose & Adair, for the defendant.

De Grey, C. J. The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo* or *left behind* in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial.[1]

[1] Gould, Blackstone, and Nares, JJ., concurred.

WAUGH v. CARVER ET AL.

2 H. Bl. 235. 1793.

ASSUMPSIT against Erasmus Carver, William Carver, and A. Giesler for goods sold and delivered by plaintiff to Giesler at his agency at Cowes. The Carvers denied that they were partners with Giesler. Verdict for the plaintiff, subject to the opinion of the court on a case stated.

The Carvers as parties of the one part entered into a written agreement with Giesler on the other part, which provided that Giesler should remove his ship-agency from Plymouth to Cowes, in the Isle of Wight, "for the purpose of carrying on a house there in the agency line, on his account;" that the Carvers should continue to carry on their business in the same line at Gosport, and that each house, in consideration of the mutual promises of assistance and recommendation, "should allow to the other certain portions of each other's commissions and profits." After specifying these portions the agreement declared: "And in order to prevent any misunderstanding or disputes, with respect to the commission and discount to be paid and divided between the said Erasmus Carver and William Carver and the said Archibald Giesler, and for the better ascertaining thereof, it is hereby mutually covenanted, declared, and agreed upon, between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that one-fifth part of the commission or agency on each ship shall and may be first retained by the party under whose care such ship or vessel shall be, as a full compensation for clerks, boat-hire, and all other incidental charges and expenses in regard of such ships or vessels respectively; after which deduction, the then remaining balance of such commissions or agency shall be divided between the said Erasmus Carver and William Carver and the said Archibald Giesler, in the proportion hereinbefore mentioned; and that such commission or agency shall be ascertained by one party's producing to the other true and authentic copies of the general accounts of each ship or vessel under their respective care and direction, signed by the several masters of such ships or vessels respectively, and notarially authenticated." "And also that they, the said Erasmus Carver and William Carver and the said Archibald Giesler, shall and will meet at Gosport on or about the first day of September yearly, for the purpose of examining and settling their accounts concerning the said commission business, and that such party from whom the balance shall then appear to be due shall and will well and truly pay or secure the same unto the other party, his executors, administrators, or assigns, on or before the 29th day of the said month of September yearly. And it is hereby likewise covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver and the said Archibald Giesler, that each party shall separately run the risk of, and sustain all such loss and losses as may happen on the advance of moneys, in respect of any ships or vessels

under the immediate care of either of the said parties respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall, at any time or times during the continuance of this agreement, be in any wise injured, prejudiced, or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall, in his own person and with his own goods and effects, respectively be answerable and accountable for his own losses, acts, deeds, and receipts." "And it is hereby further covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver and Archibald Giesler, that these presents do not nor shall be construed to mean to extend to such ships or vessels that may come to the address of either of the said parties respectively, for the purpose of loading or delivering any goods, wares, or merchandise, it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to, bear reference to their particular or separate mercantile concerns or connections."

The case was twice argued: the first time by

Clayton, Serjt., for the plaintiff,

Rooke, Serjt.; for the defendants; and a second time by

Le Blanc, Serjt., for the plaintiff,

Lawrence, Serjt., for the defendants.

LORD CHIEF JUSTICE EYRE. This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether, by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B., whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labor, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is, generally, not between the parties as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now, a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money,

and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not, nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace *v.* Smith, he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace *v.* Smith, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessaries for the ship; he contracts with them and is liable to them; he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission, indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of prófit and loss, to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount; but that is a profit in the trade, and there may be losses to him as well as to the owners. If, therefore, the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with

regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

GOULD, J. I am of the same opinion.

HEATH, J. I am of the same opinion.

ROOKE, J., having argued the case at the bar, declined giving any opinion.

Judgment for the plaintiff.

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§ 2. VARIOUS EXCEPTIONS TO THE OLD RULE.

LEGGETT *v.* HYDE.

58 N. Y. 272. 1874.

FOLGER, J. At the trial each party asked the court to direct a verdict in its favor. Each thereby conceded that there could be no dispute upon any question of fact; each thereby conceded that there was left for decision only a question of law, and that it arose upon a settled and uncontradicted state of facts.

Taking the view of the testimony the most favorable for the appellant, the facts are these: In 1869 one Putnam and Henneberger were partners in business under the firm name of A. D. Putnam & Co. In that year the appellant invested or deposited with that firm $1,500. This sum was credited on its books to Frederick Hyde, the son of the appellant; for this sum the appellant was to share in the profits of the business of the firm. His share was to be one-third, and demandable by him at the end of the year. At the end of the year his share of the profits was $500. This sum was also placed to the credit of Frederick Hyde; then, in 1870, the appellant loaned to the firm, for one year, the original sum of $1,500 and the $500 of profits, thus making $2,000. In consideration of this loan the firm agreed to hire Frederick Hyde as clerk, at $10 per week for the year; to pay the appellant one-third of the profits, which were to be settled half-yearly; and at the end of the year to take him in as a partner, if the firm and he should feel satisfied, on his making further investments and putting in more capital. Though it is nowhere in the testimony so stated in terms, yet it is fairly to be inferred that the $2,000 was loaned to be used in the business, and that if at the end of the year the appellant did not become an ostensible partner he was to be repaid out of the concern the $2,000, but without interest strictly as such. The appellant never interfered in the affair of the concern, nor exercised any control in the business. At the end of the first six months there were no profits of the business. The appellant never received anything for his $2,000, nor anything by way of interest money.

The prominent and important facts are, that he loaned the firm a sum of money to be employed as capital in its business, and that, therefore, he was entitled to have and demand from it, one-third of the profits of its business every half-year. In my judgment there results from this, that Putnam and Henneberger, making use of that money as capital in that business, used it there for the benefit of the appellant; because any return to him for the loan to them must come from the use of it. If not used so that profits were made, he got no return. Further, that he had an interest in the profits which, while they were anticipatory, was indefinite as to amount, but, when they were realized, was measured and specific as to share. Further, that his interest in them was in them as profits; that is, that he had a right on the lapse of every six months, though having no property in the whole capital, to have an account taken of the business and a division made of the profits then appearing. *Ex parte* Hampen, 17 Ves. 403. That he had this right to an account and a division at other time than at the end of each six months, if, at any other times, the exigencies of the concern,—as the dissolution of the firm by death of one partner, or any other reason — required an account to be taken. He had that interest in the profits, as profits, because he could claim a share of them specifically, as they should appear on each six months, or other accounting of the business of the term then ended, and could then have and demand payment of his share. By the terms of his contract with the firm, if it be upheld as made, he was interested in and affected by the results only of the year, as ascertained at the end of each six months. It would not affect him in this right to account, though the business of a previous year had been disastrous. If either six months' business should yield a profit, he could insist on payment to him of one-third thereof, and could demand that an account be had of the business of any six months, to ascertain if there had been profits. It was one-third of the profits that he was to have, and not a sum in general equal to that one-third; so that he was to take it as profits, and not as an amount due — not as a measure of compensation, but as a result of the capital and industry. So it is said in Everett *v.* Coe, 5 Denio, 182: "If he is to be paid out of profits made, then he has a direct interest in them." And see Ogden *v.* Astor, 4 Sandf. 321–322. The learned counsel for the appellant states the question of law to be this: Does a loan of money, with an agreement for compensation from the profits of the business, *per se*, constitute the lender a partner *quoad* the creditors of the firm? Is this statement of it correct? Does the phrase "compensation from the profits" fully meet the case? Does it fully present the fact that by the agreement the appellant obtains an interest in the profits, as such, and a right to insist upon an accounting and a division thereof half-yearly? With this supplement, the question for decision is as stated by him.

I am not to say what I think ought to be the answer to it, was this a case of first impression. I am to declare what I ascertain to be the answer already given by the law in this State, as it has been settled,

and declared by the authorities. The argument of the learned counsel is very ingenious, and very forcible when considered in reference to what should be the proper rule, and what the true reasons upon which a rule should be founded. Yet if it is found that, by a long course of decisions or by long acquiescence in and adherence to a rule some time ago authoritatively promulgated, there has been established a principle of commercial law upon which the community has acted, it is the duty of the courts to adhere thereto, leaving it to the law-making power to find a remedy, if remedy be needed, in a positive authoritative enactment. In England this has been done, and by act of Parliament an important change has been made. 28 & 29 Vic. ch. 86. In the first place it matters not that the defendants meant not to be partners at all and were not partners *inter sese.* They may be partners as to third persons, notwithstanding Manhattan Brass Co. *v.* Sears, 45 N. Y. 797, and this effect may result, though they should have taken pains to stipulate among themselves that they will not in any event hold the relation of partners. Among the reasons given is this, whether it be strong or weak: That whatever person shares in the profits of any concern shall be liable to creditors for losses also, since he takes a part of the fund which in great measure is the creditors' security for the payment of debts to them. Waugh *v.* Carver, 2 H. Bl. 235, citing Grace *v.* Smith, 2 Black. 998. The doctrine took its rise in the decisions in these cases. And commenting upon them the text writers who have presented most forcible criticisms upon it say: "The principle laid down by De Gray, C. J., in Grace *v.* Smith has served as the foundation of a long line of decisions which cannot now be overruled by any authority short of that of the legislature; and in all cases in which there is no incorporation, nor limited liability, it must still be regarded as binding on the courts." Lindley on Part. 36. "The doctrine is completely established upon the very ground asserted in Grace *v.* Smith. Story on Part. § 36, note 3; and so Mr. Parsons, in his book on Partnership, quoting Lord Eldon, *Ex parte* Hamper: "But if he has a specific interest in the profits themselves, as profits, he is a partner," adds: "Undoubtedly he is; every principle of the law of partnership leads to this conclusion." He contends, however, that the specific interest in profits which is to make a person a partner must be a proprietary interest in them existing before the division of them into shares. See also 1 Kent's Com. 25, note *v*, where it is said: The test of partnership is a community of profits — a specific interest in the profits as profits — in contradistinction to a stipulated portion of the profits as a compensation for services.

The courts of this State have always adhered to this doctrine and applied or recognized it in the cases coming before them. In Walden *v.* Sherburne, 15 J. R. 409, in 1819, Spencer, J., delivering the opinion of the court, says: "No principle is better established than that every person is to be deemed in partnership if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade. See also

Dob *v.* Halsey, 16 J. R. 34, in the same year. The principle is recognized in Chase *v.* Barrett, 4 Paige, 148, by Walworth, Chancellor; in 1833 by the Court of Errors, per Walworth, Ch.; in 1837 in Champion *v.* Bostwick, 18 Wend. 175; by the Supreme Court in 1841, per Cowen, J., in Cushman *v.* Bailey, 1 Hill, 526; and again in 1848, per Beardsly, Ch. J., in Everett *v.* Coe, 5 Denio, 180; by the Superior Court of the city of New York, per Sandford, J., in Oakley *v.* Aspinwall, 2 Sandf. 7-21; by the present Supreme Court in repeated decisions, of which see Catskill Bank *v.* Gray, 14 Barb. 471; Hodgeman *v.* Smith, 13 Id. 302; by the Court of Appeals, per Peckham, J., in Manhattan Brass Co. *v.* Sears, 45 N. Y. 797; per Leonard, C., Ontario Bank *v.* Hennessy, 48 Id. 545-552; per Gardiner, J., Barckle *v.* Eckhart, 3 Id. 132-138.

It is not too much to say the Limited Partnership Act (1 R. S. 764) is a legislative and practical recognition of this rule of commercial law. In deed, if it shall be held that such a contract as that of the appellant does not make him a partner as to third persons, there is little or no need of that act. The situation of the special partner is more onerous than that of the appellant under such a ruling. The first may lose his capital invested, as well as profits, by the same being absorbed in the payment to creditors. The latter may lose his anticipated compensation for his money loaned, but his position is quite as favorable to him as that occupied by creditors for the recovery of his money advanced. Neither may interfere — to transact business or to sign for the firm, or to bind the same; both may advise as to the management; both may examine into the state and progress of the partnership concerns — the special partner from time to time, the appellant at the end of every six months. In one respect the special partner is better placed. He may stipulate for legal interest on his capital invested, as well as for a portion of the profits. The appellant, if he bargained for profits in addition to interest, might be in conflict with Usury Act.

It is evident that most of the conveniences and advantages of the Limited Partnership Act, and some which it does not give, might be obtained by a loan of money, with a stipulation for compensation for its use, by a share of the profits, if thereby a partnership is not created as to third persons. This is not decisive as to what the law is. But it is strongly indicative of the view of the law held by the revisers and by the legislature. There have been from time to time certain exceptions established to this rule in a broad statement of it. But the decisions by which these exceptions have been set up still recognize the rule, that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker, or employee, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits; or with seamen on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage.

There are other exceptions, like tenants of land or a ferry, or an inn, who are to share with the owners in results, as a means of compensation for their labor and services. The decisions which establish these exceptions do not profess to abrogate the rule — only to limit it. It is claimed by the learned counsel for the appellant that the rule as announced in Grace *v.* Smith and Waugh *v.* Carver has been exploded, and another rule propounded which shields the appellant. He is correct as far as the courts in England are concerned. Cox *v.* Hickman, 8 H. L. C. 268, and Bullen *v.* Sharp, L. R., 1 C. P. 86, affirm that, while a participation in the profits is cogent evidence that the trade in which the profits were made was carried on, in part, for or in behalf of the person claiming the right to participate; yet that the true ground of liability is that it has been carried on by persons acting in his behalf. Those cases were very peculiar in their circumstances. After the judgments rendered in them the parliament deemed it needful to enact that the advance of money by way of loan, to a person in trade, for a share of the profits, should not of itself make the lender responsible as a partner. 28 and 29 Vic. ch. 86, as cited in Parsons on Part. 92, note *t*. If the decisions in the cases cited went as far as is claimed, it would seem that the act was supererogatory. It is suggested, however, by Kelly, C. B., in Holme *v.* Hammond, L. R., 7 Ex. 218, that the effect of the statute is, that the sharing in the profits by a lender shall be no evidence at all of a partnership. At all events those decisions have been accepted in England as settling the rule as above stated. See case last cited and cases therein referred to.

Without discussing those decisions, and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this State — as it has long been — and that we should be governed by it until here, as in England, the legislature shall see fit to abrogate it.

The references upon the appellants' points do not show that the courts of this State have yet exploded the rule I have stated. I have consulted all the authorities cited (save a few of which I had not the books, or as to which there was a mis-citation), and I do not find that the rule is questioned, further than to apply to the facts of the particular case some one or more of the exceptions to the rule which I have stated to exist.

I am of the opinion that the judgment appealed from should be affirmed, with costs.

All concur, except CHURCH, C. J., dissenting.

WEISS ET AL. v. WEISS ET AL.

166 Pa. St. 490: 31 At. 247. 1895.

Assumpsit on promissory notes against E. Weiss and Charles W. Schmidt trading as E. Weiss & Co. Their partnership liability was grounded on the following: "Agreement, made the twenty-second day of November, A. D. 1887, between Ernest Weiss, dyestuffs dealer of the city of Philadelphia, and Charles W. Schmidt, liquor dealer, of the same place. Whereas, the said Charles W. Schmidt has advanced and loaned to Ernest Weiss the sum of $6,000, for which he, the said Charles W. Schmidt, is to accept a mortgage which is drawn in favor of Weiss Bros., Germany, given by James C. Biddle upon the Dark Run Mill, in the Twenty-third Ward of the city of Philadelphia, which is to be put upon record as soon as certain papers arrive from the said Weiss Bros., and to secure the said Charles W. Schmidt until such times that the said mortgage is recorded and assigned to him, the said Ernest Weiss agrees to give a judgment note for the aforesaid loan, which note is not to be recorded except in case the said Ernest Weiss should fail in business. Further, the said Ernest Weiss agrees to give to the said Charles W. Schmidt fifteen per cent of the net profits of the business for the term of one year, after first deducting the sum of $3,000, being the yearly salary of the said Ernest Weiss. Also the said Charles W. Schmidt agrees to accept at the end of one year from the date hereof the said $6,000 for said mortgage, which is to be assigned to Ernest Weiss upon payment of the said net profits."

Isaac S. Sharp, of Sharp & Alleman, for appellants.

Samuel Peltz, for appellee.

Fell, J. The agreement between the defendants made them partners at common law in this State. The case of Waugh v. Carver, 2 H. Bl. 235, decided in 1793, which followed Grace v. Smith, 2 Wm. Bl. 998, decided in 1775, was followed and adopted to its full extent in Purviance v. McClintee, 6 Serg. & R. 259, in 1820. The well-settled rule of Waugh v. Carver was overruled in England in 1860 by the case of Cox v. Hickman, 8 H. L. C. 268, but there has been no departure from it in this State, except by legislation in 1870. In the opinion in Edwards v. Tracy, 62 Pa. St. 374, decided in 1869, Sharswood, J., pointed out the new English rule of Cox v. Hickman, but followed the old one of Waugh v. Carver, saying: "It is entirely too late now to question either the rule or the exception. We are bound to stand *super antiquas vias* by our own decided cases." In the opinion in Lord v. Proctor, 7 Phila. 630, decided at *nisi prius* the same year, he said that the rule in Waugh v. Carver was too ancient a landmark in our law to be now disturbed, and that it has accordingly been followed in Edwards v. Tracy. Since the Act of 1870 there has been no change in judicial decision. The question whether the agreement between the defendants made them partners as to third parties did not arise in Hart

v. Kelley, 83 Pa. St. 286. The agreement had been rescinded, and the claim in suit was for goods sold before it went into effect, or after it had been abandoned. Caldwell *v.* Miller, 127 Pa. St. 442, reaffirms the rule, and both Walker *v.* Tupper, 152 Pa. St. 1, and *In re* Gibb's Estate, 157 Pa. St. 59, came within the well-recognized exceptions, almost as ancient as the rule itself, which were made to avoid the injustice of its universal enforcement.

This rule has been so long established as a part of our jurisprudence that it is needless now to consider whether it is philosophical, and in harmony with the principles governing the partnership relation. The departure from it in this State — and it was doubtless the wiser course — has been by legislation. The Act of April 6, 1870, provides that a loan of money to an individual or a firm upon an agreement to receive a share of the profits of the business as compensation for the use of the money and in lieu of interest shall not make the party loaning the money liable as a partner, except as to the money loaned, provided that the agreement for the loan shall be in writing, and that the party shall not hold himself out as a general partner. This legislation distinctly recognized the rule as it had existed in this State for fifty years, and in England from 1775 to 1860, and modified it to conform more nearly to the modern English rule of Cox *v.* Hickman, *supra.*

The affidavit of defence contains a denial of the partnership, but it admits or leaves unnoticed all the allegations of fact in the statement. It is a denial, therefore, of a conclusion of law only, and raises the single question whether, under the facts as stated, the defendant Schmidt is liable as a partner. As he would have been liable before the Act of 1870, it remains only to determine whether he comes within its protection. This cannot be, unless he has complied with its provisions. The exemption from liability is on condition that the agreement shall be in writing, and that the share of the profits shall be in lieu of interest. Only a part of the agreement in this case was in writing, the stipulation for interest on the loan being oral. The interest to be paid was 6 per cent, and the defendant was to receive in addition thereto 15 per cent of the profits. The 15 per cent was not to be paid in lieu of interest, but in addition to it. The 6 per cent was not to be received as a part of the profits in lieu of interest, but was payable as interest in any event, whether there were profits or not. This agreement is not in compliance with the requirements of the statute, either in letter or spirit, and its effect is to impose a liability as a partner.

The judgment is reversed, and the record is remitted, with direction that judgment shall be entered for the plaintiff, unless other just or equitable cause shall be shown.

HACKETT v. STANLEY.

115 N. Y. 625: 22 N. E. 745. 1889.

Ruger, C. J. The determination of this case involves the construction of an agreement between James Stanley and Moulton W. Gorham, and the question whether such agreement constituted the defendant Stanley a partner as to third persons with Gorham. If it did, then the judgment must be sustained. The liability of the alleged partners is predicated upon a debt for services rendered and materials furnished by the plaintiffs, upon the request of Gorham, in fitting up a place in New York to carry on the business of heating, ventilating, etc. The part of the agreement which it is claimed creates the partnership reads as follows: "That for and in consideration of the loan of seven hundred and fifty ($750) dollars from the said party of the second part to the said party of the first part, for use in the business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years, with interest, bearing date of January 14, 1885, payment of which is secured by an assignment of said value in a certain $3,000 policy in the Massachusetts Mutual Life Insurance Company, and also by a certain chattel mortgage, bearing date January 23, 1885, and in further consideration of services of said party of second part in securing sales in said business, and for any further moneys he may, at his own option, advance for me in said business, the said party of the first part agrees to divide equally the yearly net profits of said business. It is understood and agreed that said loan of $750 is expressly for use in said business, and for no other use whatever." It was further provided that advances made by either party in the business were at all times subject to be withdrawn, at the option of the party making them, and were to bear interest while used in the business. Gorham was to be allowed $1,000 per annum for his services in managing the business, and quarterly statements of its condition were to be made by him to Stanley.

It is fairly to be implied from the contract that Gorham was to be the active man in the business, and it was to be carried on in his name; but whether he was to furnish any capital, and if so how much, is not disclosed. For aught that appears the money furnished by Stanley was all that was supposed to be necessary to start and carry on the business until returns were realized from its prosecution.

This agreement does not, in express terms, purport to form a partnership; neither is the intention to do so disclaimed; and the question is therefore whether, in a business carried on under the conditions provided for in the contract, the parties thereto became partners, as to third persons. It clearly provides for something more than a loan of money, as it is fairly to be implied from it that Stanley would render active services as a principal in the prosecution of the business, and furnish further financial aid therefor, if it became neces-

sary, and he deemed it advisable to do so. The loan was not one made to Gorham generally, but was for the benefit of the particular business, in whose prosecution Stanley had an equal interest, and any diversion of the funds from such use was strictly prohibited. Each party was authorized to charge the business with interest on the funds advanced by him for its prosecution, and they would each be entitled to *pro rata* reimbursement of such funds from the assets of the business, in case of a deficiency in assets to pay the advances in full. In that respect, it was evidently contemplated that each party should bear any loss incurred, in proportion to the advances made by them respectively. For all this, Stanley was to receive one-half the net profits of the business. His right to profits would not cease upon the repayment of the original loan, or depend upon the value of the services rendered or moneys advanced, or either of them alone, but was to continue as long as the business was carried on. The letter of the contract is that in consideration of the loan of $750, payable in two years, and the further consideration of services in securing sales in said business, and further moneys furnished, the net profits are to be divided. The services promised, and the moneys advanced and to be advanced, each and all constituted the consideration for the division of the profits. We think such an agreement, within all authorities, constitutes a partnership as to third parties. By it, Stanley had an interest in the general business of the concern; a right to require a quarterly account of its transactions; authority to make contracts in its behalf; and an irrevocable right to demand one-half of the profits of the business. That the original loan of $750 was secured to be repaid by Gorham to Stanley does not preclude the conclusion that they were partners; for it is entirely competent for one partner to guarantee another against loss, in whole or in part, in a partnership business, if the parties so agree. The application of the rule that "participation in profits" renders their recipient a partner in the business from which profits are derived, as to third persons, has been somewhat restricted by modern decisions; but we think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the fruits of an adventure a liability for credits contracted in its aid, and which are essential to its successful conduct and prosecution. This liability does not, and ought not to, depend upon the intention of the parties, in making their contract, to shield themselves from liability, but upon the ground that it is against public policy to permit persons to prosecute an enterprise which, however successful it may for a time appear to be, is sure in the end to result in the advantage of its secret promoters alone, and the ruin and disaster of its creditors and others connected with it. Atherton *v.* Tilton, 44 N. H. 452; Chase *v.* Barrett, 4 Paige, 159.

Expected profits being the motive which induces the prosecution of all commercial and business enterprises, their accumulation and retention in business are essential to their success; and if persons are permitted, by secret agreement, to appropriate them to their own use, and throw the liabilities incurred in producing them upon those who receive only a portion of the benefits, not only is a door opened to the perpetration of frauds, but such frauds are rendered inevitable. Exceptions to the rule are however found in cases where a share in profits is contracted to be paid as a measure of compensation, to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise; but where the agreement extends beyond this, and provides for a proprietary interest in the profits as a compensation for moneys advanced and time and services bestowed as a principal in its prosecution, we think that the rule still requires such party to be held as a partner.

The rule laid down in Kent's Commentaries (vol. 3, p. 25, note *b*), that "the test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services" — was approved by this court in Leggett *v.* Hyde, 58 N. Y. 272, in which case Judge Folger, . . . after referring to the English cases claimed to have qualified, if not overruled, the cases of Grace *v.* Smith, 2 W. Bl. 998, and Waugh *v.* Carver, 2 H. Bl. 235, which were the foundation of the doctrine that a participation in profits renders those receiving them partners, says that "without discussing those decisions, and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this State as it has long been; and that we should be governed by it until here, as in England, the legislature shall see fit to abrogate it." The same remark may also be applied to the cases of Harvey *v.* Childs, 28 Ohio St. 319; Hart *v.* Kelley, 83 Pa. St. 286; Beecher *v.* Bush, 45 Mich. 188; Eastman *v.* Clark, 53 N. H. 276; Emmons *v.* Bank, 97 Mass. 230 — decided in the courts of our sister States, in which the distinction between contracts of partnership *inter sese* and those making the parties partners as to third persons, although not so as between themselves, is sought to be practically abolished. The doctrine that persons may be partners as to third persons, although not so as between themselves, and although the contract of partnership contains express provisions repudiating such a relation, has been too firmly established in this State by repeated decisions to be now disregarded by its courts. See cases cited in Leggett *v.* Hyde. It is claimed that this doctrine has been practically overruled in this State by the decisions in this court of Richardson *v.* Hughitt, 76 N. Y. 55; Burnett *v.* Snyder, Id. 344; Eager *v.* Crawford, Id. 97; Curry *v.* Fowler, 87 Id. 33; and Cassidy *v.* Hall, 97 Id. 159. We do not think these cases had the effect claimed. They were all cases distinguished by peculiar circumstances, taking them out of the operation of the general rule. It cannot be disputed but that a loan may

be made to a partnership firm on conditions by which the lenders may secure a limited or qualified interest in certain profits of the firm, without making them partners in its general business; but that is not this case.

In Richardson *v.* Hughitt, *supra*, Bench Bros. & Co. were a manufacturing firm, carrying on the business of making wagons, and Hughitt contracted to advance to them $50 on each wagon manufactured by them and delivered to him, to the extent of two hundred wagons, under an agreement that upon the sale of the wagons he was to receive back the moneys advanced, with interest, and one-fourth of the net profits on such wagons. It was held that this was a mere loan of money, providing for an interest in the profits as a compensation for the money loaned. The lender secured no interest in the general business of the firm, or interest in the profits made therein, and did not become liable for its debts. It is quite clear that if such a contract had been made after the wagons were finished, it would have created simply a pledge of property for the payment of a debt, competent for the parties to make, and which would not have made the pledgee a partner. The fact that the contract was executory would not alter the real nature of the transaction or affect the relations of the parties to third persons. The case of Eager *v.* Crawford, *supra*, was a pure loan of money, with an agreement that the borrower should pay to the lender, on the first day of each month, one-half of the gross receipts of the business carried on by him, until the whole sum, with interest, was repaid. The dispute in the case was upon the question whether the stipulation for one-half the gross receipts was intended to refer to profits. The question submitted to the jury, the evidence being conflicting, was whether it was "the real understanding between the parties that Crawford should participate in the profits as such. If it was, it would constitute a partnership;" otherwise, not. This court approved the charge. In Burnett *v.* Snyder, *supra*, two of the members of an existing firm, composed of five persons, agreed with Snyder, for a good consideration, that if he would become liable to them for one-third of the losses sustained by them in the business of their firm they would pay to him one-third of the profits received by them in such business. For obvious reasons it was held that Snyder, under this agreement, took no interest in the general business of the firm, and did not become a member thereof. In Curry *v.* Fowler, *supra*, W. G. and J. E. McCormick were an existing firm, owning certain vacant real estate in New York, which they desired to improve. To enable them to do so, Fowler loaned $50,000 to them; taking as security therefor a mortgage upon the land, with an agreement that he should be repaid his loan and interest, with one-half of the profits of the adventure, which the McCormicks guaranteed should amount to $12,500. This case was decided upon the authority of Richardson *v.* Hughitt, and was said to resemble it in all essential particulars. In Cassidy *v.* Hall, *supra*, it was held that the defendants were mere lenders of money to an existing corporation. The opinion states that "under the agree-

ment the advances were to be made only upon such orders as the defendants approved, and the most that can be claimed from it is that the defendants were the financial agents of the company, to make advances and discount their paper, for the purpose of relieving the company from the financial embarrassment under which it was evidently laboring; for which they, the defendants, were to receive a proportion of the face of the orders upon which the advances were made as a compensation for the risks they incurred, and for the use of the money advanced by them. They were not generally interested in the affairs of the company, but only for a special and specific purpose; and in no sense were they partners." It cannot reasonably be claimed that either of these cases is an authority for the reversal of this judgment. Whatever might have been their bearing if they related to the loan of money alone, we will not say; but, when connected with the circumstance that the defendant was expected to render future services as a principal, and furnish further financial aid, with a certain supervision over the conduct of the business, we think this case is clearly distinguishable from those cited.

In the view taken of this case, it is quite immaterial whether the plaintiff extended the credit to Gorham alone or not, as the defendant was held liable upon the ground that, as to third persons, he was a partner; and it did not affect that liability, whether the plaintiff knew the fact or not.

The exception to the ruling of the court sustaining the objection to the question put to plaintiff on cross-examination, as to whom the credit was furnished, was not well taken, as the fact sought to be proved was immaterial. The judgment should therefore be affirmed. All concur.

STRATTON *v.* O'CONNOR ET AL.

34 S. W. 158: 12 Tex. App. —. 1896.

GARRETT, C. J. The appellees entered into a contract with one James A. King, by which they furnished him with pasturage for 720 head of cattle for 15 months, ending September 10, 1890, at the rate of 12½ cents a month for each head of cattle. This suit was brought against the said King and the appellant, Stratton, as partners, to recover the amount due for said pasturage. Appellant denied under oath that he was a partner of King. Appellees did not suppose when they entered into the contract, or during the time the pasturage for the cattle was being furnished, that Stratton was a partner of King; and the question in the court below was, were Stratton and King in fact partners? The trial judge found that they were. The only question for this court to determine is whether or not there was sufficient evidence of partnership to support the judgment.

The cattle for which the pasturage was furnished were young steers, and bought with the money of Stratton, and delivered by him to King, at a fixed valuation per head, upon an agreement between them that the latter should furnish pasturage and care for and keep them for four years at his own cost, when they should be sold, and the proceeds applied to the payment to Stratton of the agreed cost of the cattle and one-half of the expense incurred by him in delivering them from Cuero at the ranch, the balance to be divided between them equally as profits; loss, if any, was to be shared by King. If both parties agreed to it, the cattle might be sold before the expiration of four years. A part of the cattle had been bought by Stratton before the agreement between him and King was entered into, but the greater portion was bought afterwards. They were the property of Stratton, and the only interest that King had in them was his right to one-half of the profits in consideration of his pasturing and keeping them at his own expense, with a liability to share the losses. Thomas O'Connor testified that Stratton told him that he was a partner of King. Other witnesses testified to statements by Stratton that went to show that he believed himself to be a partner of King. It is unnecessary to state the evidence in detail. We conclude that it is sufficient to support the judgment of the court below.

The judgment will be affirmed.

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§ 3. Test of Intention.

POLK et al. v. BUCHANAN.

5 Sneed (Tenn.), 721. 1857.

McKinney, J. The bill seeks to charge the defendant, Buchanan, as a partner with J. L. James & Son, for the hire of slaves for the year 1854, amounting to near the sum of $2,000; not upon the ground that, in point of fact, a partnership existed, as between the parties themselves, but that as to third persons, the defendant is to be held liable as a partner, by construction of law, in opposition to the actual intention and agreement of the parties.

It appears that J. L. James & Son were iron-masters and owners of the Phœnix Furnace, situate in Montgomery County. In order to raise money to enable them to carry on their business, they had procured the defendant, Buchanan, who was a commission merchant, resident in Cincinnati, Ohio, to accept drafts, for their accommodation, to the amount of $8,000, prior to the 25th day of June, 1853. And as indemnity to him, for his liability, they, on that day, executed to him a conveyance for a moiety of said furnace, and lands appurtenant thereto, together with the fixtures, stock, etc. Shortly thereafter, to wit: On the 22d day of July, 1853, the parties entered into an agreement in

writing, the stipulations and provisions of which are stated somewhat inartificially, but their true import is manifest. After reciting the above mentioned conveyance, and the real consideration thereof, namely, Buchanan's *acceptances* for James & Son, to the amount of $8,000, the instrument proceeds as follows: "And it is understood, that the said Robert Buchanan shall receive, after the first day of January, 1854, *one-fourth of the net profits of said furnace*, in consideration of his said advances of eight thousand dollars; and his having agreed to furnish the necessary facilities, through his acceptances, to carry on said business, in such sums as may be necessary for the same." The instrument then, in substance, provides that all *metal* made at said furnace, after the 1st of January, 1854, shall be placed under the entire control of Buchanan; and that James & Son shall furnish him, monthly, with statements of the products and expenses of said furnace; that they shall take an account of stock on the 1st of January, 1854; and that any debts that they may have to provide for after that date, shall be deducted from their share of the net profits of the concern; and that Buchanan is not to be liable for any debts of James & Son, contracted either before or after the 1st of January, 1854. James & Son are bound to renew their bills and drafts on Buchanan, as they fall due, and to pay all interest, exchange, and charges on the same. It is further stipulated that said agreement should continue in force for two years, at the expiration of which time Buchanan bound himself to reconvey to James & Son the moiety of the furnace, etc., subject to his right to be indemnified out of the same, for his advances, and "share of profits." And in the conclusion of the instrument is the following statement: "*The commissions of one-fourth the profits of the furnace, being paid to the said R. Buchanan, in consideration of his acceptances of said drafts, now out, and to be given hereafter.*"

It is not assumed by the complainants' counsel that the parties, by this agreement, intended to make themselves partners. On the contrary, it is understood to be conceded in argument, and the question admits of no serious controversy, that, in fact, there was no intention to create a partnership, either as between the parties themselves, or as to third persons. But it is insisted that, by construction of law, the provision, securing to Buchanan "one-fourth of the net profits," constituted him a partner as to creditors.

The authorities are at variance upon this subject; and, as we have no decision of our own upon the point, we are at liberty to adopt such rule as may seem to us most reasonable and just in itself.

The rule of common law relied on by the complainants' counsel in support of the bill is, that a specific interest in profits, *as profits*; or, in other words, a participation in the *net profits* of a business will, by construction of law, create a partnership between the parties, in favor of third persons.

Whether, on a careful review of the English authorities, the conclusion is warranted, that any such absolute universal rule exists, is an

inquiry we need not stop to make. If it were admitted to be so, that rule has been essentially modified by the decisions of several of the American courts, and upon principles of reason and natural justice that cannot fail to command general assent and approval. Mr. Story, in his Treatise on Partnership, while admitting the doctrine of the common law, submits, whether, as an original question, it would not have been more conformable to true principles, as well as to public policy, to have held that no partnership should have been deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public. § 36.

The American authorities referred to, do not admit the doctrine that the mere fact of participation in the profits of a business, whether gross or net profits, is to be taken as conclusive of a partnership, even in favor of creditors, irrespective of the truth of the case. They seem to proceed upon the more just and sensible view, that participation in the profits affords merely a presumption which is to prevail only in the absence of proof to the contrary; and that it is a question of fact, upon inquiry and proof, whether the circumstances under which the participation in the profits exists, clearly demonstrate that the profits are taken, not in the character of partner, but in a totally different character, and merely as compensation for services or benefits rendered by the person by whom they are received. In the latter case, while it is true that, in a certain sense, the party has a community of interest in the profits, yet it is no less true that he does not participate therein as an owner or partner. He has no interest in the capital stock. He is not invested with the rights, powers, or duties of partner, nor is he liable for losses. His interest, whether it be a certain proportion of the profits, or a fixed sum to be paid out of the profits, is, at most, only as tenant in common, possessed of an undivided portion of the profits. The doctrine thus qualified and understood, makes the rule consistent with the great and leading principle of construction, that all agreements are to be expounded, and to have effect given to them, according to the manifest intention of the parties as apparent from the whole instrument or agreement, if not incompatible with established principles of law or policy. What can be more incongruous, in a case like the present, than to seize upon, and insulate the words "net profits" from the context, and by taking them in the legal sense of the phrase, give to the whole agreement a meaning and effect diametrically opposed to the expressed intention and agreement of the parties; and thus create, for the purpose of a particular determination, a fictitious relation between the parties, which, upon the face of the whole instrument, is demonstrated not to have existed? This is contrary to the established principles and analogies of the law. In deeds, wills, and every description of written instruments or agreements, technical words and phrases of defined legal import are, in general, subject to be controlled by the clearly expressed intention of the parties in the context.

The supposed distinction between *gross* and *net* profits, to which so much importance seems to be given in some of the cases, is scarcely worthy of grave consideration, in the determination of the question, whether the profits were to be received by the party, in the character of partner, or in an entirely different character. The words "net profits" may be admitted to imply, in general, a participation in *losses*, as well as *profits;* and, of course, the share of net profits would be diminished in proportion to the amount of the losses. But still, this only goes to *the amount of compensation* to be received by the agent, factor, etc.; it cannot establish the liability of such agent as a partner, where it is shown that no partnership exists.

Nor is the question whether the stipulation for a share of the profits will entitle the party to an *account*, of any more practical importance. It may be, in some cases, whether the provision be for a certain proportion of the profits, or a fixed sum to be paid out of the profits, that an account would be necessary; but this, in reason, can have no influence upon the determination of the question of fact, which necessarily lies at the foundation, whether or not a partnership was intended to be created by the agreement of the parties.

We lay it down, therefore, that in all such cases it is a question of fact, open to proof in the ordinary modes, whether or not a partnership exists by the intention and agreement of the parties. And if the fact be clearly shown not to be so, a mere stipulation that a party shall receive a specific proportion of the net or gross profits of a business, or an ascertained amount, payable out of the profits, as a compensation for services, benefits, or advantages rendered to the business, will not make such party liable as a partner, to third persons; provided he has not permitted the use of his name; or suffered himself to be held out as a partner to the public. We refer to 6 Met. 82; 10 Id. 303; 22 Pick. 151; 12 Conn. 69; 20 Wend. 70; 4 Paige, 148, 160; Story on Part. §§ 36, 38.

The decree will be reversed, and the bill be dismissed.

COX AND WHEATCROFT *v.* HICKMAN.

8 House of Lords Cases, 268. 1860.

B. SMITH and J. T. Smith carried on business in the name of B. Smith & Son. Becoming embarrassed in 1849, a meeting of creditors was held, and a deed of arrangement executed by the Smiths, as parties of the first part, by certain of the creditors as trustees, of the second part, and by the general scheduled creditors, including the trustees, of the third part. The deed assigned the Smiths' property to trustees who were empowered to carry on the business under the name of the Stanton Iron Company; to execute all contracts and instruments necessary to

carry it on; to divide the net income among the creditors in ratable proportions, which net income was always to be deemed the property of the Smiths; with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it; and, after the debts had been discharged, the property was to be re-transferred by the trustees to the Smiths. Cox and Wheatcroft were named among the trustees, but Cox never acted, and Wheatcroft resigned before the debt in suit was contracted. This action was brought on bills of exchange drawn by the plaintiff on the Stanton Iron Company, for the value of goods supplied by Hickman to the company, and accepted by the trustees, "Per proc. The Stanton Iron Company."

The cause was tried in 1856, before the late LORD CHIEF JUSTICE JERVIS, when a verdict was found for the defendants; but, on motion on leave reserved, the verdict was entered for the plaintiff. 18 C. B. 617. The case was taken to the Exchequer Chamber, when three judges, JUSTICES COLERIDGE, ERLE, and CROMPTON, were for affirming the judgment of the Common Pleas, and three other judges, BARONS MARTIN, BRAMWELL, and WATSON, were for reversing it. 3 C. B. N. S. 523. The judgment, therefore, stood, and was afterwards brought up to this House. The judges were summoned, and LORD CHIEF BARON POLLOCK, MR. JUSTICE WIGHTMAN, MR. JUSTICE WILLIAMS, MR. JUSTICE CROMPTON, MR. BARON CHANNELL, and MR. JUSTICE BLACKBURN attended.

The Attorney-General, Sir R. Bethell (*Mr. Milward* was with him), for Wheatcroft.

Mr. Welsby (*Mr. Boden* with him), for Cox.

Mr. Rolt (*Mr. Field* with him), for Hickman.

LORD CRANWORTH. In this case the judges in the Court of Exchequer Chamber were equally divided, and unfortunately the same difference of opinion has existed among the learned judges who attended this House during the argument at your Lordships' bar. Except, therefore, from an examination of the grounds on which their opinions are founded, we can derive no benefit in this case from their assistance. We cannot say that in the opinions delivered in this House there is more authority in favor of one view of the case than of the other. We must not, however, infer that your Lordships have not derived material aid from the opinions expressed by the judges. These opinions have stated the arguments, on the one side and the other, with great clearness and force, and what we have to do now is to decide between them.

In the first place, let me say that I concur with those of the learned judges who are of opinion that no solid distinction exists between the liability of either defendant, in an action on the bills, and in an action for goods sold and delivered. If he would have been liable in an action for goods sold and delivered, it must be because those who were in fact carrying on the business of the Stanton Iron Company were carrying it on as his partners or agents; and, as the bills were accepted, according to the usual course of business, for ore supplied by the plaintiff, I cannot doubt that if the trade was carried on by those who managed it

as partners or agents of the defendant, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. His partners or agents would have the same authority to accept bills in the ordinary course of trade, as to purchase goods on credit.

The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his co-partner to bind the whole firm in contracts made according to the ordinary usages of trade.

This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are, by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business.

In the case now before the House the Court of Common Pleas decided in favor of the respondent that the appellant, by his execution of the deed of arrangement, became, together with the other creditors who executed it, a partner with those who conducted the business of the Stanton Iron Company. The judges in the Court of Exchequer Chamber were equally divided, so that the judgment of the Court of Common Pleas was affirmed. The sole question for adjudication by your Lordships is, whether this judgment thus affirmed was right.

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place, there is an assignment by Messrs. Smith, to certain trustees, of the mines and all the engines and machinery used for working them, together with all the stock in trade, and, in fact, all their property, upon trust, to carry on the business; and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith.

Up to this point the creditors, though they executed the deed, are merely passive; and the first question is, What would have been the consequence to them of their executing the deed if the trusts had ended there? Would they have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, i. e., the net profits, should be applied in discharge of their demands? I think not. It was argued

that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed, they consented to

abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trusts to which they had agreed should be executed. I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable, it could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such power to be reserved to a third person, and reserving it to themselves.

I have, on these grounds, come to the conclusion that the creditors did not, by executing this deed, make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement, like that now before us, are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so; but the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favor of the appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this; but, at least, it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors I see is the Midland Railway Company, which is a creditor for a sum only of £39, and to suppose that the directors could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in Waugh *v.* Carver. There Messrs. Carver, who were ship agents at Portsmouth, agreed with Giesler, a ship agent at Plymouth, that if he would establish himself as a ship agent at

Cowes, they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Giesler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he, in fact, carried it on for the benefit of Messrs. Carver as well as of himself; and the court held that, in these circumstances, the stipulation which they had entered into that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make so as thereby to affect third persons. Each firm was carrying on business on account not only of itself but also of the other firm; this, therefore, made each firm the agent of the other.

The case of Bond *v.* Pittard, 3 M. & W. 357, could admit of no doubt. The question was, whether G. H. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had agreed to become partners on a stipulation that P. H. Watts should always receive £300 yearly out of the first profits, as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners; but the court held the contrary. Each of them worked for the common benefit of both, and each of them, therefore, acted as agent of the other. The produce of the labor of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt.

A similar principle explains and justifies the decision of the Court of Common Pleas in Barry *v.* Nesham, 3 C. B. 641. The question was, whether the defendant was liable for goods furnished to one Lowthin, in the way of his business as the printer and publisher of a newspaper. Nesham had sold the stock and good-will of the paper to Lowthin, in consideration of £1,500, and on a further stipulation that for seven years the profits were to be applied as follows: that is to say, Lowthin was to have the first £150 of the annual profits, then Nesham was to have them to the extent of £500, if they made so much, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to their private arrangements as to the shares they should separately be entitled to; Lowthin was, therefore, clearly the agent of Nesham.

Owen *v.* Body is at most a case in which a dictum may be found. The Court of Queen's Bench was quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all which was decided.

None of the other cases cited carried the doctrine farther than those I have referred to, and I therefore think that in this case the judgment appealed against ought to be reversed.[1]

[1] The opinions of CAMPBELL, CH. J., and of WENSLEYDALE, L., have been omitted. BROUGHAM and CHELMSFORD, LL., concurred.

BULLEN ET AL. v. SHARP.

L. R. 1 C. P. 86. 1865.

THIS was an action on a policy of insurance against the defendant as underwriter. The policy was actually underwritten in the name of the defendant's son. The question in the cause is, whether the defendant was a partner in the underwriting business carried on in his son's name, so as to make him liable to third persons on contracts made in the course of that business. On the trial, a verdict was taken by consent for the plaintiffs, subject to a special case, as part of which it was agreed that the court might draw any reasonable inferences of fact. The court below determined the question in favor of the plaintiffs.

It appears, that in March, 1857, the son of the defendant entered into a written agreement with one Fenn, an underwriter, which is set out in the fourth paragraph of the case. By this agreement, the son was to be an underwriter; but the management of the business was to be confided to Fenn, who, in consideration of a salary of £300 a year, was to act for the son. On the same day on which this agreement was made, the defendant authorized Fenn to state to the committee of Lloyd's that he, the defendant, had placed at Fenn's disposal £5,000, and intended to give his son further aid, if needed. In November, 1858, it was resolved to extend the business carried on by Fenn in the name of the son; and, by an agreement between them, Fenn's salary was raised to £350. On the 1st of January, 1859, the son signed a letter addressed to the defendant, which is set out in paragraph 11 of the case. By it, in consideration of the defendant's guaranteeing the son to the extent of £5,000 in his business of an underwriter until by such business he should acquire the clear sum of £5,000, the son promised to pay the defendant during their joint lives an annuity of £500 a year, to be increased in case one-fourth of the son's average annual net profits during the first three years should exceed £500, to a sum equal to one-fourth of such net average annual profits. This arrangement, as worded, would not increase the annuity, unless the son's average net profits during the first three years exceeded £2,000 a year; so that it would seem the parties contemplated carrying on a business much more extensive than was justified by a capital of £5,000; and it is not very surprising to find that, before the three years' end, the son was a bankrupt. It was expressly stipulated in the letter that the defendant should not be a partner with his son in his business.

In August, 1859, the son married; and prior to his marriage he executed a deed of settlement, which is made a part of this case. This deed was between the son, of the first part, the intended wife, of the second part, and two trustees (of whom the defendant was one), of the third part. It recites the agreements between the son and Fenn for carrying on the son's business under the management of Fenn, and

also the agreements between the son and the defendant, by which the son bound himself to pay the defendant an annuity, and an agreement, in contemplation of the marriage, by which the son engaged to convey some railway shares and other property, and also all the proceeds of his underwriting business, to trustees on certain trusts; and then the son does by the deed assign over to the trustees (one of whom is the defendant) all moneys the proceeds of the underwriting business then in the hands of Fenn or any other person who might be substituted as manager of the son's business, or thereafter so to be, and gave them a power of attorney to recover such moneys from the manager; and then the indenture declares the trusts on which the moneys are to be held. These are, in the first place, to pay the annuity to the defendant; next, to pay the son an allowance of £500 a year, to be increased, if the business prospered, to £750; then, to accumulate the surplus until it amounted to £8,500, and so remained for two years without reduction, when the engagement to pay over the future proceeds of the business to the trustees was to cease. There is a proviso that, at any time during the continuance of the engagement, the trustees were, upon the request of the son, or his manager for the time being, to raise out of the property assigned by the son and the accumulated fund any sum required to meet emergencies occurring in the underwriting business. The ultimate trusts of the accumulated fund, when it should have remained two years without reduction at the sum of £8,500, were to repay any advances made by the defendant under his guaranty, and, subject thereto, for the benefit of the wife and children.[1]

BRAMWELL, B. In this case, the plaintiffs declare that they made a policy of insurance, and that "the defendant, in consideration of a certain premium paid to him by the plaintiffs, subscribed the said policy for £100, and became an insurer thereon to the plaintiffs for that amount." The defendant pleads "that he did not subscribe the said policy or become an insurer, as alleged." And the question is, whether the plaintiffs have proved the allegation so traversed. This is the real and ultimate question; because, though this, like other cases, has been argued as though the question were whether the defendant was a partner with somebody else, and though this way of arguing is reasonable enough, as *prima facie* a partner is liable for the acts of his co-partner within the ordinary scope of partnership authority, yet, inasmuch as a man may be a partner and not liable, or not a partner and yet liable, the determination of partnership or no partnership does not settle the question which still remains, — "Did the defendant subscribe the policy and become an insurer?" Now, he did not subscribe it with his own hand; nor is he liable on the ground of holding himself out as a partner or principal in this matter; for he has not done so. The only other way in which he can be liable is, by reason of his having given authority to the person who signed it so to sign and bind him. The

[1] This statement of facts is taken from MR. JUSTICE BLACKBURN's opinion.

person who did sign it is described in the case as a "clerk;" and he signed the name of the defendant's son. Then, did the defendant give that person any authority so to sign and bind him? That he did not, in words, is certain; nor did he in intention; nor did the clerk intend to bind him; nor did his son, nor Fenn; nor did the plaintiffs suppose he was bound, or intend to deal with or trust him, but his son. If, then, he is liable, if he has given such authority, it is against the intentions of all parties; it is in spite of their meaning the contrary, and must therefore be from some force in the nature of the transaction itself. And this may be. If the defendant was really the principal, or one of the principals, in the transaction; if those who acted really were his agents; if, on the truth appearing, he had a right to say the contract was made with him, and to enforce it, — he ought to be and would be liable. As, for instance, if there was a business which required the buying of goods on credit, and if a person tried to carry it on in the name of an agent, whether such agency was an agency of a partnership or any other, so that, upon the purchase of goods by the agent or partner, the property vested wholly or in part in the first named person, then he would, as it seems to me, be liable, though he had stipulated with his agent or partner that he should not be; because he would have tried for an impossibility, for a thing repugnant in itself, viz., that the contract should be made with him, for his benefit, but not to bind him. It becomes necessary, then, to examine the facts. (After stating the facts the learned Baron continued.)

Why, then, the deed being *bona fide*, is the defendant a partner or principal in the business? He can make no contract, nor order one, nor forbid one, nor enforce one, nor release one. If the profits were £10,000 in the year, he would get nothing but his annuity; the residue would go to his son and the trust fund. His annuity would be larger, indeed; but that is unimportant. If there were no profits in any year, he would still be entitled to his £500 annuity. How can this state of facts prove that the defendant "subscribed the said policy and became an insurer?" It seems to me, therefore, that, if the defendant is held to have "subscribed this policy and become an insurer," it will be so held, though, as I have said, he has not done so in form nor in substance; and that he has so done somehow, though there is no fraud, without his or any one else concerned intending it. Surely it seems enough to state this to show that it cannot be true, and that therefore the defendant is not liable. The burden of proof to the contrary is on the plaintiffs. Now, what reason do they give? They say that the defendant is a partner with his son; and that, if not partners *inter se*, they are so as regards third parties. A most remarkable expression! Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se;* for partnership is a relation *inter se*, and the word cannot be used except

to signify that relation. A. is not the agent of B.; B. has never held him out as such; yet C. is entitled, as between himself and B., to say that A. is the agent of B.! Why is he so entitled, if the fact is not so, and B. has not so represented? But "partnership," and a "right to call persons partners as regards third parties," are words, and the thing must be looked at, viz., the taking or sharing of profits, which it is said gives C. a right as against B. to say B. is a partner of A. Why should it? I trust that, in the present state of authority, this question may be freely handled without presumption, and that the goodness of such a rule may be examined; because, though we are bound to administer the law as we find it, yet, when we are considering what is the law, we may not improperly inquire into the reasonableness of that suggested. Why, then, does a taking or sharing of A.'s profits by B. entitle C. to demand payment by B. of A.'s debts in the trade? How, if there is such taking or sharing in this case, does it prove that the defendant "subscribed the policy and became an insurer"? If A. agrees with B. to share profits and losses, but not to interfere with the business, and not to buy nor sell, and does not interfere, nor buy nor sell, and C., knowing this, deals with B., he would have no claim on A. Why should he, if he does not know of it? Why, upon finding out something between A. and B. which has in no way affected or influenced him, should he who has dealt with B. have a claim on A. It is said, because profits are what the creditor trusts to; they are his fund for payment. This would be a bad reason, if true in fact. A man who trusts another generally, has a claim on his profits and capital too. How does a man who trusts the former only more affect the creditor's fund? But, further, it really is not true in substance, only in words. It is not a receipt of profits, in substance, that makes a man liable. If I agree to receive a sum in proportion to profits, as, for instance, a sum equal to a tenth, I am not liable. If I receive a tenth, I am. What is the difference, except in words, at least as far as creditors are concerned? How can one set of words between A. and B. give C. a right, and the same thing in other words not? How many men in a thousand, not lawyers, could be got to understand that, of the two servants of a firm, the one who received a tenth of the profits was liable for its debts, and the other who received a sum equal to a tenth was not? This Mr. Justice Story calls "satisfactory." Story on Part. § 32. Satisfactory in what sense? In a practical business sense? No; but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercises, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life. Lord Eldon did not think it satisfactory. *Ex parte* Hamper, 17 Ves. 404. Such a law is a law of surprise and injustice, and against good policy. It fixes a liability on a man contrary to his intent and expectation, and without reason, and gives a benefit to another which he did not bargain for and ought not to have, and prevents that free use of capital and enterprise which is so important. It is said that

this is true of a dormant partner. It is not. His existence may be unknown to the creditor: but the dormant partner knows he is liable, and means to be; and the creditor trusts all such persons; he means to deal with all real persons. It may be said that, if this reasoning is right, a man might bargain to receive all the profits of a business, and not be liable. The answer is, the thing is impossible. There never was, and never will be, a *bona fide* agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colorable. Where there is a chance of profit to the trader, there such an agreement may be honest; and, where honest, ought not to make him liable who is certainly to receive some of the profits, and perhaps all.

I have hitherto dealt with the case on principle. I proceed to examine the authorities. The labor formerly needful is now rendered unnecessary by Cox *v.* Hickman. That case has settled the law, I may be permitted, I hope, to say, in a perfectly satisfactory manner. It is there laid down that the question in such cases as the present is one of authority, one of agency. Lord Campbell says: "The defendant can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose." Lord Wensleydale says: "And the simple question will be this, 'whether Haywood was authorized by either of the defendants as a partner in that company to bind him by those acceptances." His Lordship proceeds: "Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants partners in it?" And, further: "The question then is, whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents to bind them by acceptances on account of the business." And, generally, I refer to his whole judgment, particularly to the passage at p. 313, beginning, "Hence it becomes a test of the liability," down to "liable as a partner." Lord Cranworth puts the same two arguments together at p. 306. I refer to the passage beginning, "It was argued," and ending, "to have been made." This, then, is our guide for the future.

The question here is, Was the underwriter's business carried on by persons acting on the defendant's behalf? Now, it certainly was not. The clerk who signed the policy, Fenn, and the son, acted on the son's behalf. That is, unless the whole is a sham, — which, as I have before said, I think is not open to us to consider, nor true, if it were open to us. This ought to dispose of the case. But even if we assume that the law supposed to exist before Cox *v.* Hickman remains untouched, that is to say, the supposed law of Waugh *v.* Carver, I think the same conclusion ought to be come to. Lord Wensleydale does not notice that case. Lord Cranworth does, and, with submission, gives a better reason for the decision than is to be found in the case itself. The Chief Justice there says the question is whether they have not constituted themselves partners in respect to

other persons, and puts his decision on the ground that "he who takes a moiety of all the profits indefinitely shall by operation of law be liable to losses." Let us hope that this notion is overruled, — one which I believe has caused more injustice and mischief than any bad law in our books. But even if not, how is this case within it? By the letter of the 1st of January, 1859, after the business had proved profitable, the son agreed to pay his father, for their joint lives, £500 a year, absolutely, not out of profits, nor dependent on them; with a provision for an increase in proportion to profits if they reached beyond a certain amount. This would not make the defendant a receiver of profits, nor give him a right to an account, nor, in fact, bring him within any of the old fancied rules of liability. Then comes the settlement, in which the defendant is a trustee. As far as the settlement alone is concerned, the defendant is no more liable than the other trustee. And why is he to be liable?

It remains to notice the judgment of the court below. With great respect, I think Cox *v.* Hickman was not followed. The Chief Justice says the deed made the defendant a partner, by giving him an interest in the business; and he finishes by saying the question is whether the creditors may come on the defendant in respect of the profits. But, according to the judgment in Cox *v.* Hickman, the question does not turn on that. Byles, J., seems to consider the deed as a contrivance for giving the defendant the profits, — that, in reality, it was his business. If so, of course he is liable. Montague Smith, J., says he thinks the deed an arrangement by which the defendant was to have the profits as profits *eo nomine*, and that he is liable as a partner. But, if Lords Cranworth and Wensleydale have laid down the true rule, it is not that indicated in the last expression.

It seems to me, then, there is here no partnership, no taking of profits, which could have brought the case within what was supposed to be law before Cox *v.* Hickman; that, on reason and principle, that supposed law was wrong; that it is now condemned by the authority of Cox *v.* Hickman; that, anyhow, Cox *v.* Hickman is the governing case; and that it lays down rules which decide this in favor of the defendant.

I hope I shall not be charged with arrogance for the way in which I have spoken of bygone opinions. The law had drifted into the condition from which it was rescued by Cox *v.* Hickman. No one in particular was responsible for, and probably no one person could have put it at once in the position it was in. But the true line had been departed from, at first but a little, and for a good reason; and every subsequent move took it further away in a wrong direction, till it was happily brought back by Cox *v.* Hickman.

The opinions of the majority of the court being thus in favor of the defendant, the judgment of the court below was reversed.[1]

Judgment reversed.

[1] BLACKBURN, J., and CHANNELL, B., delivered concurring opinions. SHEE, J., and PIGOTT, B., dissented.

WILD *v.* DAVENPORT ET AL.

48 N. J. L. 129: 7 At. 295. 1886.

J. S. DAVENPORT, E. L. Voorhees, W. S. Johnson, and J. B. Davenport entered into partnership under the firm name of Davenport, Johnson, & Co., by articles of co-partnership dated Nov. 1, 1880. The articles provided that the co-partnership should commence Nov. 1, 1880, and continue for the term of three years; also that in case any of the said partners should die before the expiration of the co-partnership, the sum standing to his credit at that time in the assets of the firm should remain as a part of the capital of the firm until the expiration of the co-partnership, when all moneys contributed to the capital by any of the members should be repaid to such contributors out of the firm assets before any division of the profits should be made.

Johnson died in July, 1881, leaving a will appointing the defendants in error executors. He had contributed $15,000 of capital, and at his death $17,000 were standing to his credit. This sum continued in the business until the expiration of the partnership on October 31, 1883. The business was carried on by the surviving partners. The executors examined the books and accounts of the firm from time to time, but did not otherwise interfere with or participate in the business. It did not appear that any profits were ever received by them from the business, or that the capital standing in the deceased partner's name was ever withdrawn by them.

In October, 1883, plaintiff sold the firm of Davenport, Johnson, & Co., a bill of merchandise, and this suit was brought against the surviving partners and the executors of the deceased partner, to charge them personally jointly as partners.

The judge at the circuit decided that the executors of the deceased partner could not be held personally liable as partners.

For the plaintiff in error, *H. F. Galpin.*

Contra, Wallis & Edwards.

DEPUE, J. The bill of exceptions in this case presents the single question whether, upon the facts stated, the defendants in error, executors of the deceased partner, became personally liable as partners for debts contracted by the firm after the death of the testator.

Partnership is a relation arising from contract. It is usually defined to be a voluntary contract between competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, upon the understanding that there shall be a communion of the profits thereof between them. Story on Part. §2; 3 Kent, 23. Mr. Justice Lindley quotes from "Words of Celebrity" a number of definitions of partnership, in all of which the element of contract or agreement is fundamental. 1 Lind. on Part. 2. *Inter sese* the fact of partnership, as well as the rights, duties, and obligations of partners, arises wholly from the terms of the contract, and as to third

persons and creditors the same rule prevails, except where the persons concerned have held themselves out as partners — have acted ostensibly as interested in the business, as if they were partners in it, and have so conducted themselves as to lead people to suppose that they were willing to be regarded by them as if they were partners in fact. 1 Lind. on Part. 47; Central Savings Bank *v.* Walker, 66 N. Y. 424; Mershon *v.* Hobensack, 2 Zab. 372; 3 Id. 580.

Nor is it every contract for a share of the profits of a business that will create a partnership either *inter sese* or as to creditors. Thus, a contract for the employment of agents or servants for a proportion of the profits of the business as salaries or wages for services does not make such persons partners or liable as partners for debts contracted in the business. Voorhees *v.* Jones, 5 Dutcher, 270; Nutting *v.* Colt, 3 Halst. Ch. 539; Hargrave *v.* Conroy, 4 C. E. Green, 281; Berthold *v.* Goldsmith, 24 How. 536. To subject a person not ostensibly a partner to liability for partnership debts, there must be some contract to which he is a party in respect to a communion of profits, which gives him control as principal over the conduct of the business, or create, as between him and the ostensible partner, the relation of principal and agent. Every partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may properly be considered an agent. Story on Part. §1. In Voorhees *v.* Jones, the decision that a servant or agent who had a share of profits simply as compensation for services was neither a partner, nor liable for partnership debts, was placed by Chief Justice Whelfley on the ground that such a person had no control over the operations of the firm, and could not direct its investments nor prevent the contracting of debts, — in other words, had none of the prerogatives of a principal in the management and control of the business. 5 Dutcher, 272. . . .

My citation of authorities has been made with a view of showing that a right to receive a share of the profits of a business does not furnish an invariable test of a partnership, even as to creditors; that a person not actually engaged in the business as a principal, and not holding himself out as a partner, cannot be held for debts contracted in the business as a dormant partner, unless in virtue of some contract, express or implied, on his part in legal effect creating, as between him and the persons actually carrying on the business, the relation of principal and agent. . . .

The decisions germane to the particular case now before the court have gone upon the same principle. As a general rule the death of one partner works a dissolution of the partnership. If an executor engages in business, either as a sole trader or in a partnership, with the testator's assets, though he does it as executor, and not for his individual benefit, he will be personally liable for the debts incurred in the business, and this although he does so in compliance with directions

in the testator's will or in conformity with articles of partnership to which the testator was a party which provide that on the death of a partner his executor or personal representative shall be admitted into the firm. Wightman *v.* Townroe, 1 M. & S. 412; Labouchere *v.* Tupper, 11 Moore P. C. 198, 221; Laible *v.* Ferry, 5 Stew. Eq. 791; 2 Lind. on Part. 1060, 1061; Story on Part. §70.

A provision in articles of partnership that on the death of a partner his executor or personal representative, or some other person shall be entitled to the place of a deceased partner in the firm, with the capital of the deceased in the firm business, or some part of it, is binding upon the surviving partner to admit the executor, personal representative, or nominee of the deceased partner, but does not bind the latter to come in. They have an option to come in or not, and a reasonable time in which to elect. Pigott *v.* Bagley, 1 McC. & Y. 569; Madgwick *v.* Wimble, 6 Beav. 495; Downs *v.* Collins, 6 Hare, 418; 2 Lind. on Part. 852. An executor or nominee of a deceased partner coming in under such a provision of partnership articles comes in as a partner, and consequently becomes personally liable for debts contracted in the business. He is made personally liable for debts for the reason that he has of his own volition engaged in the business as a principal, and is a contracting party. As was said by Lord Eldon in *Ex parte* Garland, 10 Ves. 119, "He places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of liability;" and if he has acted in compliance with the testator's directions, he will be entitled to indemnity out of the testator's estate to the extent of the fund which the testator has embarked in the business, and no further. *Ex parte* Garland, 10 Ves. 109; *In re* Johnson, 15 Ch. Div. 548; Laible *v.* Ferry, 5 Stew. Eq. 791; Burwell *v.* Mandeville's Ex'rs, 2 How. (U. S.) 560.

On the other hand, a stipulation in partnership articles, that upon the death of a partner his capital shall remain in the business until the expiration of the prescribed term of the partnership, is binding as well upon the estate of the deceased as upon the surviving partner. Scholefield *v.* Eichelberger, 7 Pet. 586; Burwell *v.* Mandeville's Ex'rs, 2 How. (U. S.) 560; Downs *v.* Collins, 6 Hare, 418, 437; Story on Part. § 261 *a*. Where the provision in the partnership article is simply that the deceased partner's capital shall remain in the business, the executor is not admitted into the management of the business. The control of the business is with the surviving partner. The executor cannot withdraw the capital of the deceased partner without subjecting the estate to liability to suit, nor can he exercise the control of a partner in the conduct of the business. In this situation none of the reasons for the liability of a partner exist as against him. Hence it is that when by the articles of partnership a new member is brought into a firm on the death of a partner, as an executor or trustee, firm creditors, becoming such after the partner's death, have the personal

liability of the admitted member of the firm; but where by the articles the capital only of the deceased partner is continued in the firm without any person being added, such creditors have only the liability of the surviving partner, by whom the business is carried on, and the security of that part of the estate of the deceased partner which is left in the business. Parsons on Part. 454. Holme *v.* Hammond, L. R. 7 Exch. 218, is a case exactly in point. . . .

The cases in which the precise question has been raised which this bill of exceptions raises are few. The cases cited by the plaintiff in error from the English and American courts are those in which the personal liability of an executor voluntarily engaging in business with his testator's assets has been adjudged, or the extent of the right of partnership creditors to charge the estate of a deceased partner for debts contracted after his death has been involved. Wightman *v.* Townroe; Labouchere *v.* Tupper; *Ex parte* Garland; Edgar *v.* Cooke, 4 Ala. N. S. 588; Thompson *v.* Brown, 4 Johns. Ch. 619; Stanwood *v.* Owen, 14 Gray, 195, are cases of this class. The only cases in American courts presenting directly the question raised in this case that have come under my observation are Owens *v.* Mackall, 33 Md. 382, and Ritcher *v.* Poppenhuysen, 39 How. Pr. 83, and both of these decisions are with the defendants in error.

Nor did the defendants become partners in the business by reason of their examination into the affairs of the firm. This was a duty they performed in the execution of the trust arising out of their executorship. Nor are the rights of the creditors of the deceased partner, to have the estate of the testator settled up, and their debts paid, at all involved in the controversy. When the contingency arises upon which the payment of the testator's debts is involved, a court of equity will be competent to afford them adequate relief against tying up the estate of the testator to the prejudice of his creditors.

Upon the case presented we think that the decision of the judge that the defendants in error were not liable was correct and the judgment should be affirmed.

All concur.

MEEHAN *v.* VALENTINE.

145 U. S. 611. 1892.

THIS was an action of *assumpsit* brought by Thomas J. Meehan, a citizen of Maryland, against John K. Valentine, executor of William G. Perry, both citizens of Pennsylvania, alleging Perry to have been a partner with Lawrence W. Counselman and Albert L. Scott, under the name of L. W. Counselman & Co., and counting on promissory notes of various dates from August 10, 1883, to November 25, 1884, signed by that firm, indorsed to the plaintiff, and amounting in all to

about $10,000, with interest. The defendant denied that Perry was a partner in the firm.

At the trial the plaintiff put in evidence the following agreement:

"L. W. Counselman, Albert L. Scott. Baltimore, Md., March 15, 1880. For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of $10,000, for the term of one year from the date of said loans, we agree to pay to said Wm. G. Perry, in addition to the interest thereon, one-tenth of the net profits over and above the sum of $10,000 on our business for the year commencing May 1, 1880, and ending May 1, 1881; i. e., if our net profits for said year's business exceed the sum of $10,000, then we are to pay to said W. G. Perry one-tenth of said excess of profits over and above the said sum of $10,000; and it is further agreed that if our net profits do not exceed the sum of $10,000, then he is not to be paid more than the interest on said loan, the same being added to notes at the time they are given, which are to date from the time of said loans, and payable one year from date. L. W. Counselman & Co."

This was renewed from year to year — the last renewal being dated March 15, 1884. The renewal of March 18, 1882, was as follows: "We hereby renew the agreement made with you May 1, 1880, which is to the effect that we will guarantee you ten per cent interest upon loans amounting to $10,000, and that if the net profits of our business are over $10,000 for the year commencing May 1, 1882, and ending April 30, 1883, we will in lieu of the ten per cent interest give you ten per cent of the profits. We have two propositions for partnership May 1, and if we accept either we will then, if you desire, return your loan."

The plaintiff also called Scott as a witness, who testified that the firm was composed of L. W. Counselman and himself; that it was engaged in "the fruit and vegetable packing and oyster business" in Baltimore; that Perry was in the stationery business in Philadelphia; that the $10,000 mentioned in the agreement was paid by him to the firm, receiving their notes for it, and remained in the business throughout, no part of it having been repaid; that from time to time he lent other sums to the firm, which were repaid; that he was an intimate friend of the witness, and visited him every few weeks; that these visits were not specially connected with the business, though on such occasions Perry "usually went down to the place of business and talked business;" that he usually asked and received from the firm accounts of profit and loss; that the accounts showed an annual profit, which varied from year to year, amounting for the second year to $11,000 or $12,000; that it being then found difficult to tell at the end of the year exactly what the profits would be, it was agreed with Perry that he should thenceforth receive $1,000 each year, leaving the final settlement until the whole business was settled up, and that he received under the agreement about $1,500 the first year and $1,000 each subsequent year. On cross-examination the witness stated that

the firm made an assignment to the plaintiff for the benefit of creditors on April 30, 1885; that their liabilities were from $60,000 to $70,000, about half of which was with collateral security, and he did not know whether it had been paid out of such security; that the assets realized less than $2,000; that, so far as he knew, no dividend had been paid, and in regard to the $10,000 received from Perry, the witness testified as follows: "Question. Mr. Counselman and yourself did owe this $10,000 to the estate of Mr. Perry, did you? Answer. They had my notes for it. Q. Did you or did you not owe it? A. It was capital he had in the business the same as ours. We owed it to him. Of course we owed it to him if we did not lose it."

At the close of the plaintiff's evidence the defendant moved for a nonsuit, on the ground that there was no evidence to show that Perry was liable as a partner. The court so ruled, and ordered a nonsuit. 29 Fed. Rep. 276. The plaintiff duly excepted to the ruling and sued out this writ of error.

S. Shellabarger and *J. M. Wilson*, for plaintiff in error.

Samuel Dickson and *R. C. Dale*, for defendant in error.

GRAY, J. . . . The real question in this case is whether the evidence introduced by the plaintiff would have been sufficient to sustain a verdict in his favor. . . .

How far sharing in the profits of a partnership shall make one liable as partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his co-partners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story, Partn. chap. 4; 3 Kent, Com. 25 note, 32–34; *Ex parte* Hamper, above cited; Pott *v.* Eyton, 3 C. B. 32, 40; Bostwick *v.* Champion, 11 Wend. 571; 18 Id. 175, 184, 185; Burckle *v.* Eckart, 1 Den. 337; 3 N. Y. 132; Denny *v.* Cabot, 6 Metc. (Mass.) 82; Fitch *v.* Harrington, 13 Gray, 468, 474; Brundred *v.* Muzzy, 25 N. J. Law, 268, 279, 674. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. Benjamin *v.* Porteus, 2 H. Bl. 590, 592; Coll. Partn. (1st ed.) 14; Smith, Merc. Law (1st ed.), 4; Story, Partn. § 55; Loomis *v.* Marshall, 12 Conn. 69, 78; Burckle *v.* Eckart, 1 Den. 337, 341; Hallet *v.* Desban, 14 La. Ann. 529.

Accordingly, this court, at December Term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation

in the profits as principal," said Mr. Justice Clifford in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule however has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm, and no interest in the profits as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." Berthold *v.* Goldsmith, 24 How. 536, 542, 543. See also Seymour *v.* Freer, 8 Wall. 202, 215, 222–226; Beckwith *v.* Talbot, 95 U. S. 289, 293; Edwards *v.* Tracy, 63 Pa. St. 374; Burnett *v.* Snyder, 81 N. Y. 550, 555. (After quoting from §§ 1, 38, and 49 of Story on Partnership, and referring to Cox *v.* Hickman, 8 H. L. C. 268, the learned judge continued.) The decision was put upon the ground that the liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them, and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. Cox *v.* Hickman, 8 H. L. C. 268, 304, 306, 312, 413, nom. Wheatcroft *v.* Hickman, 9 C. B. N. s.47, 90, 92, 98, 99.

This new form of stating the general rule did not at first prove easier of application than the old one, for in the first case which arose afterward one judge of three dissented (Kilshaw *v.* Jukes, 3 Best & S. 847), and in the next case the unanimous judgment of four judges in the Common Bench was reversed by four judges against two in the Exchequer Chamber. Bullen *v.* Sharp, 18 C. B. N. s. 614; L. R. 1 C. P. 86. And as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Kelly, C. B., and Cleasby, B., in Holme *v.* Hammond, L. R. 7 Exch. 218, 227, 233; Jessel, M. R., in Pooley *v.* Driver, 5 Ch. Div. 458, 476. Such a test seems to give a synonym, rather than a definition, another name for the conclusion rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the case last above cited Sir George Jessel said: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners, a notion which was well grasped by the old Roman

lawyers, and which was partly understood in the courts of equity." And in a very recent case the Court of Appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. Bank *v.* Thompson, 121 N. Y. 280.

In other respects however the rule laid down in Cox *v.* Hickman has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. *In re* English & Irish Society, 1 Hem. & M. 85, 106, 107; Mollwo *v.* Court of Wards, L. R. 4 P. C. 419, 435; Ross *v.* Parkyns, L. R. 20 Eq. 331, 335; *Ex parte* Tennant, 6 Ch. Div. 303; *Ex parte* Delhasse, 7 Id. 511; Badeley *v.* Bank, 38 Id. 238. See also Davis *v.* Patrick, 122 U. S. 138, 151; Eastman *v.* Clark, 53 N. H. 276; Wild *v.* Davenport, 48 N. J. Law, 129; Seabury *v.* Bolles, 51 Id. 103; 52 Id. 413; Morgan *v.* Farrel, 58 Conn. 413.

In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or services to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business, and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive but not conclusive evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner in any sense. So an agreement that the lessor of an hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. Perrine *v.* Hankinson, 11 N. J. Law, 181; Holmes *v.* Railroad Co., 5 Gray, 58; Beecher *v.* Bush, 45 Mich. 188. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. Wilson *v.* Edmonds, 130 U. S. 472, 482; Richardson *v.* Hughitt, 76 N. Y. 55; Curry *v.* Fowler, 87 Id. 33; Cassidy *v.* Hall, 97 Id. 159; Smith *v.* Knight, 71 Ill. 148; Williams *v.* Soutter, 7 Iowa, 435, 446; Smelting Co. *v.* Smith, 13 R. I. 27; Mollwo *v.* Court of Wards, and Badeley *v.* Bank, above cited.

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. Beauregard *v.* Case, 91 U. S. 134; Hackett *v.* Stanley, 115 N. Y. 625, 627, 628, 633; Pratt *v.* Langdon, 12 Allen, 544; 97 Mass. 97; Rowland *v.* Long, 45 Md. 439. And in Mollwo *v.* Court of Wards, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability, for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 C. P. 438. But in the case at bar no such element is found.

Throughout the original agreement and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan, for which the partnership was to pay him legal interest at all events, and also pay him one-tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that "it was capital he had in the business the same as ours; we owed it to him; of course we owed it to him if we did not lose it."

Upon the whole evidence a jury would not be justified in inferring, on the part of Perry, either "actual participation in the profits as principal," within the rule as laid down by this court in Berthold *v.* Goldsmith, or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in Cox *v.* Hickman and the later English cases. There being no partnership in any sense, and Perry never having held himself out as partner to the plaintiff or to those under whom he claimed, the Circuit Court rightly ruled that the action could not be maintained. Pleasants *v.* Fant, 22 Wall. 116; Thompson *v.* Bank, 111 U. S. 529.

Judgment affirmed.[1]

[1] In Thillman *v.* Benton, 82 Md. 64: 33 At. 485 (1895), it is said: "It may be true that a participation in the profits of a business, standing alone, unless explained, lead to the conclusion that the business was carried on for the mutual benefit and the joint authority of all the parties participating in such profits. But when the participation

MERRALL *v.* DOBBINS.

169 Pa. St. 480: 32 At. 578. 1895.

FELL, J. The question raised by the case stated is whether Richard J. Dobbins and Hugh F. Griffin were partners as to third parties in conducting the business of the Howland Hotel at Long Branch in 1892. Their relation is to be determined entirely by the agreement into which they entered, as no facts outside of it are stated. By the first three clauses of the agreement,[1] Dobbins leased the Howland Hotel, together with all the personal property on the premises, for three months, to Griffin for $20,000, payable in four equal instalments. Thus far, the agreement is a lease; but, at this point, in form, substance, and apparent intent, the similitude ceases. The additional provisions, inconsistent with the relation of lessor and lessee, which indicate a joint interest between the parties, as owners of the business, are, in their order, as follows: (1) That Griffin shall give his undivided attention, and devote his best energies, to the promotion of the business to be done on the said premises; (2) that Dobbins or his representatives shall have the right of free access to the premises at all times; (3) that, in addition to the sum of $20,000, Dobbins shall have 80 per cent of the net profits derived from all of the business done on the premises; (4) that, in addition to the current expenses of the hotel, and the business done therein, there shall be charged to the expense account the cost of insurance, water and sewer rents, license fee, interior repairs, and the salary of a person, to be designated by Dobbins, who shall keep the books, and act as cashier, receive all

in profits arises from a particular clause in an agreement between the parties, before you can justly say that such participation is *prima facie* evidence of a partnership, it will be necessary to look not only to that clause, but all other clauses in the contract, and then determine whether the contract, taken as a whole, justifies the conclusion that there is a partnership; that is, whether there is a joint business carried on in behalf of all the parties, or whether the transaction is one of loan between debtor and creditor, the loan or interest on the loan to be paid by an amount equal to a certain share in the profits. And, looking to this agreement as a whole, it cannot, it seems to us, be considered as a contract of partnership, to be carried on jointly for the benefit of all the parties to the agreement; that is, a business in which all the parties are principals, with authority to bind each other by obligations entered into according to the ordinary usages of trade. On the contrary, by every fair rule of construction it is an agreement by which the defendant was to loan to the company $2,000 additional, and to be paid for the use of the money an amount equal to a certain proportion of the net profits. . . . Outside of this agreement, there is no evidence whatever to charge the defendant as partner. He did, it is true, now and then examine the books of the company, and gave his views as to the manner in which the business ought to be conducted, and in conversations with Von Hafften and Gailey, the members of the firm, spoke of the business as "our business," and, when the company got into difficulties, he refused to advance any more money, preferring, as he said, to bear his share of the losses, rather than put more money in the concern. All these acts were consistent with his relation as a creditor of the company, for upon the successful management of the company depended the payment by it of the $2,000 loaned, and the payment of part of the net profits for the use of the money."

money, deposit it in his own name, and make all payments; (5) that, at the termination of the agreement, a statement shall be made of the business done, and that Griffin shall receive 20 per cent of the net profits; (6) that, at the expiration of the lease, Dobbins shall pay to Griffin $1,000, and that Dobbins shall have the right at any time, upon 24 hours' notice, to annul the agreement, and assume sole and exclusive possession of the property; (7) that Griffin shall have absolute control and management of the business during the continuance of the agreement, and assents to a transfer of the license if the agreement shall be annulled. This agreement is called by the parties a lease, and it provides that Dobbins shall not be liable for the business done or for the debts contracted by Griffin. In favor of construing it as a lease, it may be said that its unusual provisions are explained by the unusual character and use of the property. Valuable real estate and a large amount of personal property were being used for a business that was precarious. The season was short, and the outcome uncertain, and dependent upon conditions beyond the control of the lessee. To apportion the rent, under such circumstances, so that a part should be fixed and certain, and a part conditional, was a reasonable and not unusual business arrangement, and the provisions were to ascertain and secure the payment of the conditional rent. This construction, however, makes a new agreement for the parties. It assumed, what they do not say, that the 80 per cent of the net profits derived from the business is to be paid as additional rent. The rent named is $20,000, and this amount is twice named as the total rent. The 80 per cent of the net profits is in addition to the rent. It cannot be considered a part thereof without disregarding the words used, and giving effect to an undisclosed intention. The difficulties in the way of considering the agreement a lease are insuperable. The lessor would be given a share of the profits, not a sum proportionate to a share, and not as rent, but directly as profits. He would have the right of access to the premises at all times and for all purposes; to appoint a bookkeeper and cashier, who should receive all moneys, make all payments, and retain possession of the balance. He would have the right to an account, and was bound to pay his lessor $1,000, and could at his option, with or without cause, terminate the lease. The lessee would contract for the exclusive control of his own business, and covenant to give it his entire time and attention. He would be forbidden to keep his own books or to touch a dollar of his own money. He could neither receive nor pay any money derived from his business, and had no control of the net balances. He gets nothing until the end, when, after the statement of an account, he is to receive 20 per cent. At the expiration of the term, or its earlier termination at the will of the lessor, he is to be paid by the lessor $1,000, and this, in any event, whether there are profits or not. These are not the characteristics of a lease, but of a partnership. The business to be carried on is not spoken of as the business of Griffin, except in the single instance where it is provided that "the

party of the first part shall not in any wise be liable for the business done by the party of the second part." In all other parts of the agreement it is spoken of or referred to as "the business done on the premises." It is to "the business done on the premises" that Griffin is to give his whole attention; of it that the bookkeeper is to take charge, an account to be stated, and the net profits ascertained; and from it that he is to be paid, and the parties to receive, the one 80 per cent and the other 20 per cent. The business of which the agreement speaks, and of which an account is to be kept, a statement made, and the profits divided, is the business of a distinct entity, — a partnership, — in which the parties are joint owners, and in which they share as proprietors. This seems to be the only fair conclusion to be drawn from the acts of the parties.

The agreement is our only guide. If it is evidence of the intention of the parties to become joint owners of the business to be carried on, we need not consider whether they became partners against their will, by operation of law. We are not concerned with the question whether the law of the State by which the contract is governed is in harmony with the old English rule of Grace *v.* Smith, 2 W. Bl. 998, and Waugh *v.* Carver, 2 H. Bl. 235, which makes participation in the profits conclusive of the liability of the participant to creditors, without regard to the agreement or intention of the parties, or with the modern rule of Cox *v.* Hickman, 8 H. L. C. 268, under which a participation in profits is held to be strong, but not conclusive, evidence of a partnership, and the whole transaction is taken into consideration in order to determine whether the relation of partners was to be created. If there was a partnership resulting from intention, all other questions drop out of the case.

The judgment is affirmed.

CLIFTON *v.* HOWARD.

89 Mo. 192. 1886.

Henry, C. J. This is an action of replevin to recover of defendant thirty-two head of fat cattle taken by him as the property of James K. Estis on an execution against Estis in favor of B. S. Walker. The defence was that plaintiff in this case and Estis had fraudulently conspired to cheat and defraud the creditors of Estis, who was in fact the owner of the property, and that Clifton's claim was made in furtherance of said fraudulent scheme.

The evidence tended to prove that plaintiff, Clifton, and Estis, both residents of Morgan County, had for years been purchasing and shipping cattle to St. Louis, each on his account and to different commission houses, Clifton to Irons & Cassidy, and Estis to George R.

Taylor & Company. That neither was using his own capital. That they severally had an agreement with their respective commission merchants, by which he was to purchase cattle for his commission merchant, and, when the cattle were delivered in the stock yards at Versailles and billed for shipment in cars, he could draw a sight draft on his commission merchant for the amount paid for the cattle, he having previously paid for them by his individual checks on banks at Versailles. That when the cattle in controversy were levied upon in the stock yards at Versailles they had been billed by Clifton to Irons & Cassidy, and Clifton had drawn a sight draft on them in favor of a bank at Versailles for the amount necessary to cover his checks on said bank to pay for the cattle. That said cattle were purchased by Clifton and paid for by his individual check on said bank, and that Estis had no interest in said cattle, except under the following arrangement made by and between him and Clifton, about two years before this bunch of cattle was purchased, viz.: In order to avoid conflict and rivalry between them in the cattle trade in that neighborhood, it was agreed that in all lots of cattle bought in the same neighborhood, and shipped by either, the other should have half the profits, if any, arising from the shipment, and should pay half the losses of such shipment and sale, if any, and, in pursuance of said arrangement, they often assisted each other in loading stock on the cars, and accompanied each other in purchasing, and when a portion of the cattle in controversy were purchased, Estis was present, and was also present when the cattle were seized by Howard, the sheriff. That when either went out of his own neighborhood and bought cattle, it was on his own account, and the other did not share in the profits of such purchases. That between the time these cattle were levied upon, and the date at which they were replevied and shipped, cattle declined in St. Louis forty or fifty cents on the one hundred pounds. The demand of Walker against Estis was the individual debt of Estis, with which plaintiff had no connection whatever, and was contracted long before Clifton and Estis had any business connection with each other. . . .

The court tried the cause upon the theory, as indicated by the instructions given at defendant's instance, and the refused instructions of plaintiff that a mere participation in the profits and loss of the venture by one who had no other interest in the property, was sufficient to constitute him a co-partner of the other party in the property itself. This question was elaborately considered in the opinion of this court, delivered by Judge Napton, in the case of Donnell *v.* Harshe, 67 Mo. 170, and the conclusion announced was "that a mere participation in profit and loss does not necessarily constitute a partnership." This case was followed in that of Musser *v.* Brink, 58 Mo. 242, and again in the same case reported in 80 Mo. 350; Rapp *v.* Vogel, 45 Mo. 524, is to the same effect.

Alfaro *v.* De La Torre, decided by the English High Court of Chancery, a brief synopsis of which decision will be found in 3 C. L. J. 473,

seems to be directly in point on the question, and in harmony with what this court held in the cases, *supra*.

In Story on Partnership, § 27, the learned author says: "And accordingly it has been held, at the common law, that if A. is owner of goods, and agrees with B. that B. shall be interested in a particular portion of the profit and loss of the adventure, or voyage abroad, in which the goods are to be embarked, such an agreement will not alone make A. and B. partners in the goods, as between themselves, but only partners in the profits." As to persons who have dealt with them as partners this question would be presented. It is not however in this record, because the debt for which the cattle were seized, was contracted by Estis, on his own account, long before he and this plaintiff had formed any business connection. As to such a creditor, his debtor must have an interest not only in the profits and losses, but also in the property, the subject of the speculation. In Alfaro *v.* De La Torre, *supra*, the ruling seems to have been, that an agreement between two persons to divide the profit or loss upon a sale of goods, which are to be bought and paid for by one of them, does not create a joint property in the goods.

The judgment is reversed and the cause remanded.

All concur.[1]

CANTON BRIDGE CO. *v.* CITY OF EATON RAPIDS.

65 N. W. 761: 107 Mich. —. 1895.

HOOKER, J. To determine whether persons are in fact partners, we must look at their intention, and this is deducible from their declaration as to their intention, and the agreements that they make regard-

[1] In Walker *v.* Hirsch, 27 Ch. D. 460 (1884), Cotton, L. J., made the following comments on Pawsey *v.* Armstrong, 18 Ch. D. 698: "If that case is to be considered as binding, it would go far to support the plaintiff's contention, because then, as I understand, Mr. Justice Kay did lay down that if there was an agreement to share profits and losses, whatever the intention of the parties as expressed in the agreement might be, that of necessity imposed upon them the position of partners with the consequential right of each member of the partnership to have on the dissolution a share in the assets and the profits arising upon the sale of the assets. In my opinion that is not right as between the parties themselves. Whether they be said to be partners in the sense of sharing profits, or anything else, you must look for the rights which they have as between themselves to the fair construction of the contract."

Lindley, L. J., said, "As regards the case of Pawsey *v.* Armstrong, I have not examined it with care, and do not wish, therefore, to say anything about it. Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words; their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered."

In Winter *v.* Pipher *et al.*, 64 N. W. (Ia.) 663 (1895), it is said: "There are cases which hold that a community of interest in profits is sufficient to constitute a partnership. But this court is committed to the doctrine that there must be a sharing of the losses."

ing the subject matter; and, where the contract under which the business engagement is made contains the express or implied disavowal of an intention to assume the partnership relation, no partnership will be found to exist, unless such declaration is so at variance and so inconsistent with their engagement as to be irreconcilable. If the actual engagements are incompatible with the expression of intention, the latter must yield to the former; but, where they can be reconciled, the latter must govern. Mr. Justice Cooley says, in Beecher *v.* Bush, 45 Mich. 193: "If the parties intend no partnership, the courts should give effect to their intent, unless some one has been deceived by their acting or assuming to act as partners; and any such case must stand upon its own peculiar facts, and upon special equities." And Chancellor Kent, in the case of Post *v.* Kimberly, 9 Johns. 470, after admitting the rule that expressed intention must yield to actual engagements, says: "But every doubtful case must be solved in favor of the intent; otherwise, we should carry the doctrine of constructive partnership so far as to render it a trap to the unwary." We see no reason to force partnership relations and obligations upon parties who did not desire or intend to assume them, especially where the interests or rights of third parties are not to be affected. With this in view, we will examine the contract between these alleged partners, in the light of the circumstances surrounding the transaction.

The Canton Bridge Company was a manufacturer engaged in providing material, manufacturing and erecting bridges, from iron, having an extensive factory at Canton, Ohio, and doing business in that and other States. An examination of the written contract between the plaintiff and Mr. Wheaton will show its first provision to be a recital of the fact that the "Canton Bridge Company has this day appointed R. D. Wheaton its agent to contract for bridges and general iron work, and to do any other work in connection with the general business, when directed, in several States. It agrees to advance all money necessary to pay all general expenses incurred in said business, upon detailed statements of account, rendered monthly." Wheaton promised to devote his entire time and ability to the business, in consideration of which the Canton Bridge Company agreed to pay to Wheaton one-half of the net profits. These were to be arrived at by deducting the expenses from the contract price of jobs, the balance to be divided equally; losses, if any, to be divided in the same way. There was a further agreement that the company should buy one-half interest in certain tools owned by a firm, then existing, of R. D. Wheaton & Co., said interest belonging to one Derst. Under this contract the parties were to share the profits and losses, but the Canton Bridge Company was to furnish the material and labor, or advance the necessary funds to pay for the same. There is nothing to indicate that Wheaton was to own any share in these materials. He was to give his services, and that was all of the obligation that he assumed. The contract does not bind him to put a dollar into the common enterprise. These things

being true, it is entirely consistent that he should be an agent, as the contract states, and that he should be "paid" by the company for "his services," and that his salary or compensation should be one-half of the profits. Numerous decisions support the proposition that a share of the profits may be treated as compensation merely. See authorities cited in the opinion of Mr. Justice McGrath in Dutcher *v.* Buck, 96 Mich. 163.

Does the sole remaining fact, viz., the sharing of losses, necessarily make the parties partners, against the express agreement that Wheaton was agent, to be "paid" by plaintiff for his "services," for whatever labor "they should direct him to perform" in relation to their property? It would seem to be reasonable to conclude that the provision concerning losses was designed to induce care on the part of the agent in taking contracts. It carried his interest in case of unprofitable work a little beyond the line of the mere loss of profits, and no reason suggests itself why that might not be consistent with the existence of an agency, instead of a partnership. In Beecher *v.* Bush, 45 Mich. 200, numerous cases are cited to the proposition that a share of the profits may be compensation for services. Ordinarily, an agreement to put service against capital, and share the profits and losses, will warrant the inference of a partnership; but such does not absolutely constitute a partnership, as a legal conclusion, where other circumstances show that no partnership was created or intended. See Bates, Partn. § 29, where this subject is discussed, and numerous instances cited to show that the intention controls where not inconsistent with the undertakings of the parties. We understand this to accord with the views expressed by Mr. Justice Cooley in Beecher *v.* Bush. Among the cases cited in support of this proposition by the author quoted is Morgan *v.* Stearns, 41 Vt. 398, in which it is said that, "sharing the profits and loss of the business is not decisive as between the parties, as there may have been merely an arrangement with view to compensation for services." Again: "When plaintiff was to cultivate defendant's farm, each to pay half of the expenses. and divide the profits equally, a charge that they were partners was held erroneous." This arrangement plainly covered a sharing of the losses, as well as profits; and such contracts are of every-day occurrence, yet no one thinks of treating them as partnerships, though they might be if the parties so intended. Donnell *v.* Harshe, 67 Mo. 170. In McDonald *v.* Matney, 82 Mo. 358, the owner of a bank agreed to give A. one-third of his net profits for a year; A. to bear one-third of the losses, and to attend to the business, but B. to have entire control. The court said that mere participation in profit and loss does not necessarily constitute a partnership *inter se*, but that it is a question of intention. Where plaintiff was to share in profits and losses of defendant's business for three years, in the proportion of 17½ per cent, and to act as salesman, but not to have the right of partnership in the firm, and the capital then standing to his credit on the books was to remain in at 7 per cent, but he could draw an annual

amount for his support, it was held that the parties were not partners *inter se*. Osbrey *v.* Reimer, 51 N. Y. 630. See, also, Stevens *v.* Faucet, 24 Ill. 483; Fawcett *v.* Osborn, 32 Ill. 412; Mair *v.* Glennie, 4 Maule & S. 240; Dwinel *v.* Stone, 30 Me. 384; Ross *v.* Parkyns, L. R. 20 Eq. 331; Walker *v.* Hirsch, 27 Ch. Div. 460; Bullen *v.* Sharp, L. R. 1 C. P. 86. In the case of Monroe *v.* Greenhoe, 54 Mich. 9, "A man arranged with a firm that he would buy standing timber, and cut, pile, and ship it, being paid therefor its cost and a certain sum per thousand. The firm was to sell it, and, after paying all expenses, was to divide the net proceeds with him equally, and he was to bear half the losses. But he had nothing to do with disposing of it after shipment, and the firm had no control over it before. Held, that this arrangement did not amount to a partnership as to the unshipped lumber at least; and the parties concerned could not be taxed as a firm upon such lumber." In that case Mr. Justice Campbell, speaking for a unanimous bench, said: "We do not think this agreement made any partnership, in the proper sense of the term, except, possibly, in such lumber as was actually loaded on the car, and there are difficulties in the way of holding even that." Dutcher *v.* Buck, 96 Mich. 167, should not be held conclusive of the question in this case. There was, in that instance, "community of property, interest, and profits." Such was not the case here, for there was not community of property. Wheaton was owner of nothing, while the plaintiff was owner of all materials, and its credit might be pledged upon the basis of monthly payments for labor and such materials as it did not furnish. Again, in the case before us the status of the parties is made clear, and it is apparent that the relation of principal and agent was intended. It does not appear so clearly in Dutcher *v.* Buck. The circuit judge was therefore in error in his instruction that the plaintiff and Wheaton were copartners, and that a verdict must be rendered for the defendant.

The judgment should therefore be reversed. A new trial is directed.

LONG and GRANT, JJ., concurred with HOOKER, J.

MONTGOMERY, J., and MCGRATH, C. J., dissented.

CLIFT *v.* BARROW.

108 N. Y. 187. 1888.

PECKHAM, J. This is an action brought by the plaintiff, who alleges that he is the surviving partner of the firm of C. Pardee & Co., against George Barrow, the maker of a promissory note dated the 1st of January, 1877, payable one year after date, to the order of C. Pardee, who died on or about the 9th of April, 1878, without having indorsed it. The plaintiff claims that the note is a part of the assets of the firm of C. Pardee & Co., and that he is the survivor of that firm. The defendant puts in a general denial.

First. Upon the trial the plaintiff, for the purpose of sustaining his claim to be the survivor of the firm of C. Pardee & Co., put in evidence the following paper:

Mem. of an agreement made between the said parties, . . . that the said Pardee to use the name of the said Clift in the firm of C. Pardee & Co., in the business of banking in Skaneateles; that said Clift is not to participate in the profits or losses of the said firm, except that the said Clift is to have for his share of the profits ten per cent per annum for all deposits he may make in said banking office from time to time. The said Pardee doth hereby covenant to and with said Clift to keep him harmless from all losses, debts, dues, or demands that may come against said firm of C. Pardee & Co.; and it is hereby agreed and understood between the said parties, that the said partnership is to continue so long and no longer than is quite agreeable to both parties, each party having the privilege of dissolving the said firm at any time he may choose, the said Pardee returning to said Clift all his deposits in the said banking house, with ten per cent per annum, payable semi-annually. This agreement to bind the heirs and assigns of the respective parties.

Witness our hands and seals this 31st day of December, 1870.

C. PARDEE [L. S.],
J. L. CLIFT [L. S.].

He also gave evidence tending to prove that Pardee and himself, after the execution of this agreement, did business under and in pursuance of it; that the business was done by Pardee, but under this agreement, and that there was no other agreement between them. The evidence was sufficient, if believed, to show that under that agreement, from the time of its execution until the death of Pardee, the business of C. Pardee & Co. was transacted. Evidence was also given tending to show that this note formed part of the assets of that firm, if the fact of the partnership were established; and the case was submitted to the jury upon these two questions: (1) Whether the parties had acted under the agreement above set forth; and (2) Whether this note was part of the assets of the firm. The jury in finding a verdict for the plaintiff necessarily found both of these issues in his favor, and the first question which arises here is whether the paper above set forth can be properly construed as forming a partnership between the plaintiff and Pardee.

We think it can. In the first place the intention to form a partnership seems to be plain. That intent, while not controlling, is still important in the examination and consideration of the paper executed by the parties, and which is claimed to amount to an agreement for the formation of a partnership between them. There is a mutual agreement that Pardee is to use the name of Clift in the firm of C. Pardee & Co. in the banking business at Skaneateles. That must mean that Pardee and Clift are to enter into partnership to that effect. The plaintiff must be taken to have known that by the agreement thus made, when acted upon, and when his name was therefor used with his consent as one of the firm, that he thus became liable for the debts of

the firm created under this agreement from the time of its execution and the entering into the business of the firm under it. The plaintiff thus contributes to the firm his name and his liability to pay the debts thereof. It is then provided that Clift is not to participate in the profits or losses of the firm. That expression is, however, immediately explained by stating that he is to participate in the profits and the amount of such participation is to be measured by ten per centum upon all deposits that he may make in the banking office of this firm, from time to time. Looking at the whole instrument it fails to show that plaintiff is not to participate in the profits; but the language used is simply another way of expressing the idea that the profits which Clift is to be entitled to from this firm are to be measured by the amount of ten per cent upon such deposits as he may from time to time make in the banking house. And it does not mean that he is to receive this ten per centum upon all his deposits in case the profits of the concern should not amount to that sum; but the clear idea to be obtained from the language used is that his share of the profits is to be measured by this ten per cent, provided there have been profits to that amount from which such payment made be made. The promise of Pardee to return to plaintiff, upon the dissolution of the firm, the deposits made by him in the banking house, with ten per cent, etc., must be also construed as based upon the same condition (implied from the language used), that the profits shall equal the ten per cent. If there are no profits, then the only obligation is to return the deposits, and that obligation is simply a debt from Pardee to the plaintiff. A condition of there being profits is thus attached to the payment of the ten per cent, both during the existence of the firm and subsequent to its dissolution.

It is claimed, however, on the part of the defendant, that the agreement to Pardee, whereby he covenants with the plaintiff to keep him harmless from all losses, debts, dues, or demands that may come against said firm of C. Pardee & Co., shows that there never was any partnership entered into between the two. It is argued that there was no right to claim profits, *as profits*, under this agreement, and that there was no liability for losses sustained by the firm because of this agreement to indemnify made by Pardee. In regard to the profits we have already spoken; as to the losses, the plaintiff was liable from the moment the agreement was signed, and business done pursuant to it, for all the debts that might be contracted in the course of the transaction of the firm business. The covenant was not one to prevent the existence of any liability on the part of the plaintiff, but it was a mere covenant to indemnify and save harmless the plaintiff from all losses, debts, dues, or demands that might come against the firm. The result of this agreement is that the plaintiff hazarded his property in the venture with Pardee, and it is no answer to claim that he was never entitled to any profits, as profits, because he made no agreement and was under no obligation to make deposits with the firm. That was simply the mode pointed out by the agreement by which his share

of the profits was to be determined, and it was in no sense a provision that he should not be entitled to profits as profits.

Second. Coming as we do to the conclusion that this agreement formed, when acted under, a partnership between these two individuals, and also that there was evidence upon which to find that the note in suit was a portion of the assets of the firm, the main question in dispute is disposed of.

The court was asked to charge the jury that if it should find from the evidence, that this contract was a device to cover usury between the parties to it, then the plaintiff in this action cannot succeed. The court refused, and the plaintiff excepted. In this we think there was no error. Construing this contract as we do, the fact appears that the plaintiff put his whole property at the hazard of the successful termination of the business of this firm, with no right to any interest unless it arose from profits; and that the money which he deposited was, as we have stated, simply a measure upon which to compute the ten per cent for his profit arising from the banking business, provided for in the contract of partnership. There was no evidence in the case upon which to predicate any allegation of this instrument being used as a device to cover usury, assuming that, if such device did exist, it might be proved without having been alleged as a defence in the action. So long as by the terms of the instrument he was not entitled to interest, unless the profits were enough to pay it, we see no basis for submitting any question of usury to a jury. There is no evidence that the plaintiff had the least knowledge of there having been no profits upon any occasion when the interest was credited to him. He took no part in the management of the firm business, and was ignorant of how it stood financially. The court committed no error in its refusal to charge as requested. . . .

We think that the decision of the Circuit and General Term were right and that the judgment should be affirmed with costs.

All concur, except RUGER, CH. J., not sitting.

Judgment affirmed.

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§ 4. PARTNER BY ESTOPPEL.

THOMPSON ET AL. v. FIRST NAT. BANK OF TOLEDO.

111 U. S. 530. 1884.

GRAY, J. The plaintiff (below) at the trial sought to charge Thompson with liability as a partner upon two grounds: First, that he was actually a partner. Second, that if not actually a partner, he had held himself out to the world as such. And the case was submitted to the jury upon both grounds (who returned a verdict for plaintiff).

The first and second assignments of error relate to the exclusion of

evidence offered by the defendants bearing upon the first ground of action. The third and fourth assignments of error relate to the instructions given and refused as to the second ground of action. . . .

The remaining and the principal question in the case is, whether the liability of Thompson, by reason of having held himself out as a partner, was submitted to the jury under proper instructions.

The court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with the partnership. The court declined to give this instruction; and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part.

This court is of opinion that the Circuit Court erred in the instructions to the jury, and in the refusal to give the instruction requested.

A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contradicted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership.

As his liability rests solely upon the ground that he cannot be permitted to deny a participation, which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership.

There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority, is, as in other cases of estoppel *in pais*, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of

law is always the same, that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.

The whole foundation of the theory that a person, who, not being in fact a partner, has held himself out as a partner, may be held liable as such to a creditor of the partnership who had no knowledge of the holding out, and who never gave credit to him or to the partnership by reason of supposing him to be a member of it, is a statement attributed to Lord Mansfield in a note of a trial before him at *nisi prius*, in 1784, as cited by counsel in a case in which it was sought to charge as a partner one who had shared in the profits of a partnership. By so much of that note as was thus cited, which is the only report of the case that has come down to us, it would appear that in an action by Young, a coal merchant, against Mrs. Axtell and another person, to recover for coals sold and delivered, the plaintiff introduced evidence that Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same under an agreement between them, by which she was to bring what customers she could into the business, and the other defendant was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers or were of her recommending; and that bills were made out in their joint names for goods sold to her customers; and that the jury found a verdict against Mrs. Axtell, after being instructed by Lord Mansfield that "he should have rather thought, on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." Young *v.* Axtell, at Guildhall Sittings after Hilary Term, 24 Geo. III., cited in Waugh *v.* Carver, 2 H. Bl. 235, 242. But as the case was not there cited upon the question of liability by being held out as a partner, it is by no means certain that we have a full and accurate report of what was said by Lord Mansfield upon that question; still less that he intended to lay down a general rule, including cases in which one, who in fact had never taken any part in or received any profits from the business, held himself out as a partner.

In delivering the judgment of the Common Bench in Waugh *v.* Carver, Chief Justice Eyre said: "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable,

if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." 2 H. Bl. 246.

This statement clearly shows that the reason and object of the rule by which one, who, having no interest in the partnership, holds himself out as a partner, is held liable as such, are to prevent frauds upon those who lend their money upon the apparent credit of all who are held out as partners; and the later English authorities uniformly restrict accordingly the effect of such holding out.

In McIver *v.* Humble, in the King's Bench in 1812, Lord Ellenborough said: "A person may make himself liable as a partner with others in two ways, either by a participation in the loss or profits; or in respect of his holding himself out to the world as such, so as to induce others to give a credit on that assurance." And Mr. Justice Bayley said: "To make Humble liable, he must either have been a partner in fact in the loss and profit of the ship, or he must have held himself out to be such. Now here he was not in fact a partner, and the goods were not furnished upon his credit, but upon the credit of Holland and Williams." 16 East, 169, 174, 176.

In Dickinson *v.* Valpy, in the same court in 1829, Mr. Justice Parke (afterward Baron Parke and Lord Wensleydale) said: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." 10 B. & C. 128, 140. See also Carter *v.* Whalley, 1 B. & Ad. 11.

In Ford *v.* Whitmarsh, in the Court of Exchequer in 1840, a direction given by Baron Parke to the jury in substantially the same terms was held by Lord Abinger, Baron Parke, Baron Gurney, and Baron Rolfe (afterward Lord Cranworth) to be a sound and proper direction; and Baron Parke, in explaining his ruling at the trial, said: "I told the jury that the defendant would be liable if the debt was contracted whilst he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation and believing the defendant to be a partner, gave him credit under that belief." Hurlstone & Walmsley, 53, 55.

In Pott *v.* Eyton, in the Common Bench in 1846, which was an action by bankers to recover a balance of account against Eyton and Jones,

on the ground that either they were actual partners in the business carried on by Jones, or Eyton had by his own permission been held out as a partner, Chief Justice Tindal, delivering the judgment of the court, said: "There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn Quay, or that they supposed him to be a partner. One person who had been manager, and another, who had been a clerk in the bank, were in court; and if they could have given such evidence, they would no doubt have been called as witnesses. We must assume therefore that credit was given to Jones alone; and if Eyton is to be made liable, that must be on the ground of an actual partnership between himself and Jones." 3 C. B. 32, 39.

In Martyn *v.* Gray, in the same court in 1863, Chief Justice Erle and Mr. Justice Willes expressed similar opinions. 14 C. B. N. S. 824, 839, 843. The decision of the Court of Exchequer in Edmanson *v.* Thompson, in 1861, is to the like effect. 31 L. J. N. S. Ex. 207; S. C. 8 Jurist (N. S.), 235.

Mr. Justice Lindley, in his Treatise on the Law of Partnership, sums up the law on this point as follows: "The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct."

"The expression in Waugh *v.* Carver, 'if he will lend his name as a partner he becomes as against all the rest of the world a partner,' requires qualification; for the real ground on which liability is incurred by holding one's self out as a partner is that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in Dickinson *v.* Valpy.

"No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent, and secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." Lindley on Partn. (1st ed.), 45–47; (4th ed.) 48–50.

The current of authority in this country is in the same direction. Benedict *v.* Davis, 2 McLean, 347; Hicks *v.* Cram, 17 Vt. 449; Fitch *v.* Harrington, 13 Gray, 469; Wood *v.* Pennell, 51 Me. 52; Sherrod *v.* Langdon, 21 Iowa, 518; Kirk *v.* Hartman, 63 Pa. St. 97; Hefner *v.* Palmer, 67 Ill. 161; Cook *v.* Penhryn Slate Co., 36 Ohio St. 135; Uhl *v.* Harvey, 78 Ind. 26. The only American case, cited at the bar, which tends to support the ruling below, is the decision of the Commission of Appeals in Poillon *v.* Secor, 61 N. Y. 456. And the judgment of the Court of Appeals in the later case of Central City Savings Bank *v.*

Walker, 66 N. Y. 424, clearly implies that in the opinion of that court a person not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiffs gave credit to him.

The result is, that, both upon principle and upon authority, the third and fourth assignments of error, as well as the first, must be sustained, the judgment of the Circuit Court reversed, and the case remanded to that court with directions to order a *New trial.*

SCARF *v.* JARDINE.

7 Appeal Cases, 345. 1882.

Scarf and Rogers were partners under the name of W. H. Rogers & Co. In July, 1877, they dissolved partnership. Scarf retired, and one Beech formed a partnership with Rogers, and the new firm carried on business under the old name. Jardine, a customer of the old firm, sold and delivered goods to the new firm after the change, but without notice of it. After receiving notice, he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate. Later, he brought this action for the price against the late partner Scarf. Denman, J., gave judgment for Scarf. The Court of Appeal reversed this, and gave judgment for Jardine.

Forbes, Q. C., and *G. E. S. Fryer*, for Scarf.

Finlay, Q. C., and *C. A. Russell*, for Jardine.

Lord Watson. My Lords, this case has been disposed of by the Court of Appeal upon the assumption that the position of the appellant is, in law, precisely the same as if he had been in fact a partner of the firm by which the debt sued for was contracted. Had the appellant actually been a member of the firm of W. H. Rogers & Co. on the 30th of January, 1878, when the goods, the price of which is now in question, were ordered, he would thereby have become the debtor of the respondent, and it would in that case have been necessary for him to satisfy your Lordships that the facts admitted, or proved, are sufficient to sustain the inference that the respondent has agreed to discharge his claim against the appellant, and to accept the new firm of W. H. Rogers & Co. as his debtors. In such circumstances the original debtor must continue to be liable unless there has been payment or novation of the debt.

The appellant had, in point of fact, ceased to be a partner of the firm of W. H. Rogers & Co. before the goods were ordered or supplied to the new firm. Notwithstanding that fact, he was estopped from asserting as against the respondent, who had been one of his customers, that the contract was not made with the old firm, because notice had not

been given to the respondent of its dissolution by his ceasing to be a partner. In other words, although the goods were ordered and received by the new firm, it was the right of the respondent, if he chose to assert it, to insist that the old firm, and not the new, must be held to have contracted with him, and to be liable for the price of goods supplied under the contract before he received the notice of the 21st of February, 1878. He had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfilment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that, having chosen to proceed against one of these firms for recovery of his debt, he could thereafter treat the other firm as his debtor.

I am accordingly of opinion that the facts of the present case raise no question of novation, and that the only question to be determined is whether the respondent did or did not elect to take the new firm of W. H. Rogers & Co. as his debtors for the price of the goods furnished by him prior to the 25th of February, 1878, under the order given by that firm upon the 30th of January.

In this aspect of the case it becomes unnecessary to dispose of the question discussed and decided in the courts below, namely, whether the transaction of the respondent with the new firm, subsequent to the notice of February, sufficiently establish the appellant's plea of *novatio debiti*. I am of opinion, with your Lordships, that the legal proceedings to which the respondent resorted in August and September, 1878, fully warrant the inference that he did elect to take the new firm as his debtors, and consequently that he has no right to recover the debt for which he sues from the appellant.

Order reversed: judgment of Denman, J., restored, with costs.[1]

THAYER *v.* GOSS.

91 Wis. 90 : 64 N. W. 312. 1895.

AT the trial by the court it was found, among other things: (1) That prior to November 5, 1891, the defendant Alfred J. Goss and J. D. Putnam were doing a milling business together as co-partners under the firm name of J. D. Putnam & Co. (2) That on that day the partnership was dissolved, and the said Putnam and the defendant Alfred J. Goss signed and caused to be published, at the place of said business, a notice as follows, to wit: "Notice of Dissolution. Notice is hereby given that the co-partnership formerly existing between the undersigned, J. D. Putnam and Alfred J. Goss, under the firm name of J. D. Putnam & Co., is this day dissolved by mutual

[1] LORD SELBORNE, L. C., and LORDS BLACKBURN and BRAMWELL delivered concurring opinions.

consent, and the business will in the future be carried on under the firm name of J. B. Goss & Co., who will settle all claims of the late partnership. J. D. Putnam. Alfred J. Goss. November 3, 1891." (3) That it was then understood that the partnership property should be conveyed to the defendant J. B. Goss, and that he should carry on the said business, and pay the debts of the firm of J. D. Putnam & Co., doing business under the name of J. B. Goss & Co.; but by mistake the property was conveyed to the defendant Alfred J. Goss, who, pursuant to said agreement, afterwards conveyed it to the defendant J. B. Goss, and he carried on the business under the name of J. B. Goss & Co., having no partner. That there was in fact no partnership existing between the defendants, and Alfred J. Goss had no interest in the profits of the business of J. B. Goss & Co. as partner. (4) That the note sued on was executed in the manner and for the consideration set forth in the complaint, and the plaintiff, when she took the same, understood and believed that J. B. Goss & Co. was a firm consisting of J. B. Goss and Alfred J. Goss, and that there was such a holding out by the said Alfred J. Goss as to induce her to so believe, and to act upon such belief. As a conclusion of law the court held that the plaintiff was entitled to judgment against both defendants for the amount of the note and costs. Aside from the proof of the signing and the publishing of the notice as before stated, it appeared in evidence that the plaintiff saw the published notice in the "River Falls Journal," and she testified that she believed that the defendant Alfred J. Goss still continued in the business, but she had never heard any one say so; that she believed that J. B. Goss and Alfred J. Goss continued the business. From the judgment on such finding the defendant, Alfred J. Goss, appealed.

Spooner, Sanborn, Kerr, & Spooner, for appellant.

F. M. White, for respondent.

PINNEY, J. The familiar and well-settled rule is that a dissolution of the co-partnership by act of the parties, whether a complete discontinuance of the concern, or the retirement of a single partner, or addition of a member, does not affect the outside world, unless proper notice is given; that actual notice must be brought home to former customers, or those who are creditors by having dealt with it, but notice by publication is sufficient as to all others. Bates, Partn. § 606; 1 Lindl. Partn. *221. The plaintiff must be regarded as a former customer or dealer with the firm of J. D. Putnam & Co., and, as such, entitled to actual notice, she having loaned them money, though but in a single instance, for which she was then their creditor. She comes within the reason of the rule. Bates, Partn. § 613; Bank *v.* Howard, 35 N. Y. 500; Lyon *v.* Johnson, 28 Conn. 1; Wardwell *v.* Haight, 2 Barb. 553; Vernon *v.* Manhattan Co., 22 Wend. 191; Bank *v.* Norton, 1 Hill, 577.

The ground upon which notice of the discontinuance of the concern by act of the parties, or the retirement or addition of a member is

required, is stated as arising from a species of estoppel to deny the continuance of the agency of each of the partners for the firm, or on the ground of negligence whereby credit is given, or from a presumption of a continuance of the former relations, giving to one who once knows of the existence of a firm the right to assume that it remains the same, so that, until proper notice of dissolution, a partner's attitude is like that of a partner by holding out. Bates, Partn. § 607; Vernon *v.* Manhattan Co., 22 Wend. 192, 193. In Scarf *v.* Jardine, 7 App. Cas. 349, it is stated that the principle upon which those who have dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred, "is that of the estoppel of a person who has accredited another, as his known agent, from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret revocation," in partnership, there being an agency by which one partner is the agent of the firm for the time being to carry on the partnership according to the usual course. 1 Lindl. Partn. 40; Thompson *v.* Bank, 111 U. S. 540, 541.

The plaintiff saw the published notice, and about eighteen months afterwards she took the note upon which she sues in lieu of the J. D. Putnam & Co. note, and the question is whether the published notice, and the manner in which the new note was executed, can be fairly held to constitute notice to the plaintiff that the defendant Alfred J. Goss had ceased to be a partner in the concern. If the change in the name was such as to indicate that he was no longer a member, there would certainly be no ground for holding him liable. In the firm name of J. D. Putnam & Co., Alfred J. Goss was mentioned under the ambiguous and uncertain designation "& Co." The notice affirms that the partnership of J. D. Putnam & Co. is dissolved, and that the "business will, in future, be carried on under the firm name of J. B. Goss & Co.," who are to settle all claims of the late co-partnership. It is fairly evident that a new member, J. B. Goss, has been introduced into the business, and it may fairly be inferred that Putnam had retired. Now, what business was it that in future would be carried on under the new firm name? Plainly, the business of the former firm. Here is no intimation that Alfred J. Goss has retired. On the contrary, the fair implication is that he remains under the designation "& Co.," as was the case in the name and style of J. D. Putnam & Co. Beyond the fact of the dissolution of the former co-partnership, that the business would in future be carried on under the firm name of J. B. Goss & Co., and that they would settle all claims of the late co-partnership, the notice wholly fails to convey any direct information; but, as observed, we think it may be fairly inferred that Putnam had withdrawn and that Alfred J. Goss remained in the business; that the change was substantially a reorganization by the withdrawal of a former member and by taking in a new one. There is no intimation that Alfred J. Goss had sold out his interest, or that

he had no interest in, or was not a member of, the alleged firm of J. B. Goss & Co.

The proposition is laid down that when the change of name is relied on it "must indicate the retirement of the particular partner sought to be held, for, otherwise, though it be a dissolution of the identical partnership, it is also notice of a new one, in which all the former members may be presumed to continue." Bates, Partn. § 623. We regard this rule as eminently practical and just, and it has the sanction of high authority. In Howe *v.* Thayer, 17 Pick. 91, there was, in effect a dissolution, and the organization of another firm with a different name. The retiring partner, Thayer, was held liable to the former dealers, because the change of name did not indicate that he was the partner going out; and Shaw, C. J., said: "When a business is carried on by three or more as partners, and one withdraws, or one is added, or both, and notice thereof given, and the business is carried on as before, those as to whom no notice is given must be presumed to hold the same relation to the concern that they did before; and such a change furnished no presumption that the others have ceased to be partners. If the plaintiff knew that Colton had withdrawn, and ceased to be a partner, it was not, in law, a notice to the plaintiff of the dissolution of the partnership, as to all its members to the effect contended for, and to the purpose for which that proposition was advanced, namely, to exempt the other members from liability. Or if it was, in a certain sense, evidence and notice of the dissolution of the same identical partnership that existed before, it was at the same time evidence and notice of the formation of a new partnership among all the remaining members of the firm to carry on the same business, holding the same relation to its customers and the public, with the single exception implied from the fact that the retiring member will be no longer liable for new contracts, and that the acceding partner will thenceforward become liable."

But it is insisted that the new note was not given by the firm with which the plaintiff had been connected; that that firm had been dissolved, and that there never was in fact any such firm as J. B. Goss & Co. But this contention is met and answered in the case of Thread Co. *v.* Wortendyke, 24 N. Y. 550, in which the rule laid down in Howe *v.* Thayer, *supra*, is cited and approved. In that case Denio, J., says that: "In every case where a partner has withdrawn, and there is a further dealing with the remaining partners under such circumstances as to leave the retiring partner responsible, the contract is not between the creditor and the former firm, but it is with a new firm, which the creditor has been led to believe still embraced the partner who has in fact gone out. The bare fact, therefore, of the dissolution of the old firm and the creation of a new one, with which the credit sought to be enforced was had, and which did not embrace one of the old partners, is not conclusive against the plaintiff." In the present case the notice was to the effect that "the business will in future be carried on under

the firm name of J. B. Goss & Co.," who will settle all claims of the late partnership, and it is said that no such firm was created; but, whether so or not, the signature to the new note, as well as the notice, gives rise to the just inference, we think, that Alfred J. Goss continued in the business under the new name, and, if there was no new firm formed in fact, it is difficult to see how he can claim to be exonerated from liability. In the case of Thread Co. *v.* Wortendyke, *supra*, the firm with which the plaintiff had dealt was "Wortendyke Brothers." Subsequently the firm was dissolved, and one of the brothers retired, and a new firm was formed, another brother becoming, with the others, members of the new firm, under the firm name of "Wortendyke Brothers & Company;" and a note was given to the plaintiff, a former dealer, in the latter name, for goods sold after the dissolution. The plaintiff having had no actual notice of the dissolution, it was held that the retiring member was liable on the note, notwithstanding the change in the firm name, and that the plaintiff had a right to assume that the former partners remained in the business; that a change of firm name, in order to exonerate a retiring partner, must show that he had withdrawn from the business, and that a change not indicating this is insufficient to put dealers on inquiry.

It must be held, we think, that the notice in this case was an assurance or holding out to the plaintiff and former dealers that the business would be carried on under the new name of J. B. Goss & Co. Alfred J. Goss had been described in the firm name of J. D. Putnam & Co. as the company, and the fact that the name of J. B. Goss took the place of that of J. D. Putnam was no notice of the withdrawal of Alfred J. Goss, but, upon the principles already stated, was equivalent to a holding out that he still remained in the business, and as a member of the firm of J. B. Goss & Co., designated therein in like manner as in the case of the firm of J. D. Putman & Co., whether any such firm existed or not; so that he is liable on the note in suit, signed in the name of J. B. Goss & Co., as by holding out and by estoppel. We think that the judgment of the Circuit Court is correct.

The judgment of the Circuit Court is affirmed.

ASKEW *v.* SILMAN.

95 Ga. 678: 22 S. E. 573. 1895.

SIMMONS, C. J. Mrs. Silman sued Askew and others, alleged to be members of the firm of Austin & Co., upon a promissory note signed in the firm name, and dated June 17, 1890. Askew pleaded "Not indebted;" also that he had not signed the note, nor authorized any person to do so for him, and had never ratified the signing; and further, that he was not a member of the firm when the note was signed, and

was not bound by the contract; that the firm was dissolved January 11, 1888, and had ceased to do business from that date, which fact was known to the plaintiff when the note was executed. There was a verdict for the plaintiff against all the defendants sued, and Askew made a motion for a new trial, which was overruled, and he excepted.

1. The main question at issue on the trial of the case was whether there was such notice of the dissolution of the partnership as would relieve Askew from liability for the debt in question. It appeared from the evidence that the dissolution took place, as alleged in the plea, more than two years prior to the date of the note, and that the note was given by Austin, one of the co-partners, without the knowledge or consent of Askew, for money borrowed by Austin in the name of the firm at the time the note was executed. Askew's withdrawal from the partnership was announced soon after the dissolution, in a newspaper published in the town in which the plaintiff resided and the firm conducted its business, the announcement appearing at different times, in the form of news items written by the editor of the paper. The plaintiff was a subscriber to the newspaper when these notices appeared, but testified that she did not see them, and that she had no notice or knowledge of the dissolution at any time prior to the execution of the note, but supposed, when she took the note, that Askew was still a member of the firm. She had been a customer of the firm, as a purchaser of goods, during Askew's connection with it, but was not a creditor before the date of the note. The court, in certain instructions to the jury, which are complained of by the plaintiff in error, charged them, in effect, that if the plaintiff was a "customer" of the firm, she would be entitled to actual notice of the dissolution. We think the court erred in so charging. In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known "to creditors and to the world" (Code, § 1895); but it is not necessary that the notice should be actual or personal except to creditors. Although it is often said in text-books and decisions that actual notice or knowledge of the dissolution must be brought home to former "customers" of the firm, this language has reference only to creditors. See 2 Bates, Partn. § 613; 17 Am. & Eng. Enc. Law, p. 1124. A customer, in the sense in which the term was used in this case, — that is to say, one whose dealings with the partnership have been confined to the purchase of its goods, — is entitled only to such notice as should be given to "the world."

2–4. As to the notice which should be given to "the world," no inflexible rule can be laid down. Publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made, is usually sufficient notice to the world. Ewing *v.* Trippe, 73 Ga. 776; T. Pars. Partn. (4th ed.) § 317, and notes. And see Richards *v.* Butler, 65 Ga. 593; Ellison *v.* Sexton,

105 N. C. 356. An editorial notice, not signed by any member of the firm, may be as effectual for this purpose as an advertisement purporting to issue by authority of the partners over their signature. Solomon *v.* Kirkwood, 55 Mich. 256; Young *v.* Tibbitts, 32 Wis. 79. Whether this is so or not is generally a question for the jury, and the court in the present case erred in charging, as a matter of law, that such notice would not be sufficient. "It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, — as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership, — are proper to be considered on the question of notice." Lovejoy *v.* Spafford, 93 U. S. 430. It should be left to the jury to say whether the retired partner made a reasonable and *bona fide* effort to acquaint the public with the fact of his retirement, and whether, on the other hand, the creditor, with the means and opportunity afforded him, knew, or ought to have known, of the fact. Even in the absence of any showing that notice of the dissolution was given, the fact that a considerable time elapsed between the dissolution and the contracting of the debt has been deemed sufficient to render the creditor chargeable with notice. Certainly this fact would go far to show that the debt was not or ought not to have been contracted on the credit of a former partner. T. Pars. Partn. (4th ed.) §§ 317, 322. There is some question as to whether the jury may infer notice from general notoriety of the dissolution. See 2 Bates, Partn. § 622, and cases cited. We think, however, that the evidence excluded by the court below in this case, as to the general notoriety of Askew's withdrawal from the partnership, although such notoriety may not of itself have been sufficient to charge the plaintiff with notice of the fact, ought to have been allowed to go to the jury, to be considered by them for what it was worth, in connection with the other evidence bearing on the question of notice.

Judgment reversed.

In re FRASER. Ex parte CENTRAL BANK OF LONDON.

[1892.] 2 Q. B. 633.

The bank presented a bankruptcy petition against John and William Fraser, on a bill for £500 accepted in the name of W. & J. Fraser. John Fraser resisted the making of a receiving order against him, on the ground that at the date of acceptance he was not a partner with William Fraser. The registrar found that this was the fact, and dismissed the petition as to John Fraser.

Hopkinson, Q. C., and *Vivian Morter*, for the bank.

F. H. Mellor, for John Fraser, was not heard.

KAY, L. J. . . . As regards the question of "holding out," I think it is clearly proved that at the time when the acceptance was given John Fraser was not a partner in the firm. He had been a partner, but the partnership had been dissolved, and the business was, with the consent of John Fraser, being carried on by William Fraser under the old firm name. The bank, who claimed to be creditors of John Fraser in respect of the acceptance, had had no dealing with the old firm. Does the fact that John Fraser permitted his brother to carry on the business under the old firm name amount to the representation by him to the bank that he, John Fraser, was a partner in the firm? I think that Newsome *v.* Coles, 2 Camp. 617, shows that it does not. In that case Thomas Coles and his three sons, William, George, and Charles, had carried on business in partnership under the firm of "Thos. Coles & Sons." The father died in 1805, and the three sons continued to carry on business under the same firm till the year 1808. George and Charles then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the "London Gazette," and was sent round to the correspondents of the house. William Coles continued the old business by himself, under the old firm, and in March, 1810, he accepted in that name a bill of exchange drawn upon Thomas Coles & Sons. The plaintiff, the holder of the bill, had not had any dealings with the partnership of Thomas Coles & Sons, when composed of the three brothers, and when he took the bill he did not know that that partnership had been dissolved. He sued the three brothers upon the acceptance, and it was held by Lord Ellenborough that the brothers George and Charles were not liable. They had done all that they could to notify the dissolution of the old partnership. In the present case the evidence shows that, when the dissolution of partnership took place, the partners notified it to their bankers and to their principal creditors. The appellants say that before they discounted the bill they inquired of those bankers who were the partners in the firm of W. & J. Fraser, and that the manager told them John Fraser was a partner. But the manager was not called, and there is really no evidence of such a statement. I think the facts bring the case within the principle of Newsome *v.* Coles, and that there is no estoppel as against John Fraser. In my opinion the registrar's decision was right.

Appeal dismissed.[1]

[1] The statement of facts has been abridged, and LORD ESHER'S opinion is omitted. BOWEN, L. J., concurred.

EVANS & HOWARD CO. *v.* HADFIELD.

93 Wis. 665: 68 N. W. 468. 1896.

THE action is against the defendant alone for goods sold. The defendant had carried on business at Milwaukee under the firm name "Hadfield & Co." In January, 1892, he bought the entire business, and continued it in his own name, "Joseph Hadfield," or by his initial, "J. Hadfield," indifferently, until November, 1892, when he sold out the business to Julia P. Hadfield, his son's wife, and her mother. From this time the business was carried on in the firm name of "J. Hadfield & Co.," with the defendant's son, Charles, as general manager. The plaintiff is a non-resident corporation, residing at St. Louis, in the State of Missouri, and had done business with the defendant as "Hadfield & Co.," "Joseph Hadfield," and "J. Hadfield." It received no notice that the defendant had gone out of business. In December, 1892, it received orders for goods by telegraph, followed by letters all signed "J. Hadfield & Co." Plaintiff replied by telegraph to Joseph Hadfield & Co. It shipped the goods to Joseph Hadfield & Co. They were charged on plaintiff's books, invoiced, and shipped to Joseph Hadfield. It does not appear that Joseph Hadfield had any interest in the business of J. Hadfield & Co. But it does appear that he was cognizant of the firm name in which it carried on its business, and he had paid the plaintiff for goods previously ordered and shipped to J. Hadfield & Co. On the evidence it was held, in effect, that the defendant should be estopped to deny that he was one of the firm of J. Hadfield & Co., and judgment was given against him for the plaintiff's debt. From that judgment this appeal is taken.

Hoyt, Ogden, & Atwell, for appellant.

Elliot, Hickox, & Groth, for respondent.

NEWMAN, J. . . . It is further urged that the evidence which tends to show an estoppel is insufficient to sustain the verdict. The defendant had been carrying on a business at Milwaukee under the style "Joseph Hadfield" and "J. Hadfield," indifferently. He was known to the plaintiff with whom he had dealt under both names. After sale to his son's wife and her mother, the same business was carried on at Milwaukee, with his knowledge, and without his dissent, in the name of "J. Hadfield & Co.," — the same name with the "& Co." added. This was not the initial of any member of the firm. The firm was Julia P. Hadfield and her mother. The firm name used naturally suggested, or might suggest, that the defendant had taken one or more partners into his business, but was not calculated to suggest that the defendant had retired from the business. His name was really the explicit part of the firm's designation. It was well calculated to deceive. The defendant should have foreseen that this use of his name was well suited to give the impression that he was the leading partner in the new firm, — at least, to those who had dealt with him as J.

Hadfield. It was his name and initial. From identity of name, it is natural to infer identity of person. When this use of his name by his successors in the business was brought to his notice, it would seem that common prudence, not to say good faith, should have induced him to notify, at least, his former correspondents that he had retired from the business; for so he might avert peril from himself, and loss from them. For it cannot be said that the order in the new firm's name, which contained both the defendant's surname and initial as it had been used by him in the business, made in the same business in which he had previously dealt with the plaintiff, could fairly be deemed to constitute notice to the plaintiff that the defendant had retired from the business. On the contrary, the retention of his name would seem rather to indicate that he is continuing in the business as a part of the new firm. Thayer *v.* Goss, 91 Wis. 90. It is a familiar principle that, where one of two innocent persons must suffer a loss, that one through whose fault or carelessness the occasion for loss arises must bear it. The evidence was sufficient to take the question to the jury. It seems to have been fairly submitted, and the verdict is amply sustained by the evidence.

There was a special verdict with no general finding against the defendant. There was no dispute about the general facts not found in the special verdict. On the undisputed evidence and verdict the court entered judgment against the defendant alone for the amount of the plaintiff's claim. This was no error, for, though the effect of the evidence and verdict is to estop the defendant to deny that he is one of the firm of J. Hadfield & Co., and to render him liable to the plaintiff in the same manner and to the same extent as if he had been in fact a partner in that firm, Thayer *v.* Goss, *supra;* Thayer *v.* Humphrey, 91 Wis. 276, he was not liable severally for the whole debt, but only jointly with the real partners, Keith Bros. & Co. *v.* Stiles, 92 Wis. 15, and had a right to insist that they should be joined as defendants in the action, and that the judgment should not be, in form, severally against him, but jointly against all the partners. Brawley *v.* Mitchell, 92 Wis. 671. But he had waived this right to require the joinder of other parties as defendants, and to have merely a joint judgment against himself, by not pleading this defect of parties in abatement. Rev. St. §§ 2649, 2654; Smith *v.* Cooke, 31 Md. 174; 1 Enc. of Pl. & Prac. 14, and cases cited in notes.

The judgment of the Circuit Court is affirmed.

SHERROD ET AL. v. LANGDON ET AL.

21 Ia. 518. 1866.

PLAINTIFFS seek to recover damages resulting, as they allege, from the purchase by them, of defendants, of a certain lot of sheep. In one count it is alleged that the sheep were represented to be free from disease, and that this was false. Defendants appeal from a verdict for plaintiffs.

Hendershott & Burton, for the appellants.

Perry & Townsend, for the appellees.

WRIGHT, J. . . . The court instructed the jury that if H. Langdon participated in the sale of, and so talked and acted in connection with the sale as to lead plaintiffs, as reasonable men, to believe the said Henry was a partner in said sheep, and they so understood it, and he did not correct the impression, then he is estopped from now denying it as against plaintiffs. The giving of this instruction is now assigned as error, upon the ground that the defendant Henry is not liable, if not the owner or party beneficially interested, unless his representations were relied upon and induced the purchase. And we are referred to McCracken *v.* West, 17 Ohio, 16. There, however, the representations were made *to* one person or firm, and a third party claimed the benefit of it. No such question is made or arises in this. Nor does the point made in argument arise, for the only proposition ruled by the instruction is, that this defendant might be liable, though not a partner or interested in the sale, if he held himself out as such, and induced the plaintiffs to believe that he was such partner. . . .

Judgment affirmed.

TAYLOR v. WILSON.

58 N. H. 465. 1878.

PLAINTIFF, as mortgagee of certain property, brought trespass against the defendant, who, as sheriff, attached and sold the chattels on a writ against Thayer and Wellman. It appeared that Thayer and Wellman had carried on a meat business as partners, during a part of 1875, although Thayer never acquired any ownership in the property in question, and left the business in November, 1875. No formal dissolution ever took place.[1]

Albee, for the plaintiff.

Barber, for the defendant.

CLARK, J. Persons may so conduct themselves as to become liable as partners, although no partnership actually exists; as, when one allows his name to be used, and himself to be held out as a partner, the law

[1] The statement of facts has been abridged.

holds him responsible, as a partner, to third persons dealing with the supposed firm. So a person, by permitting his property to be used and held out as the property of a partnership, may make that property liable for the debts of the partnership. Pars. on Partn. 495. In such case the ownership of the property is not changed, but the owner, by permitting his property to appear as the property of the firm, as a part of the foundation of their credit, is estopped, as to the creditors of the firm, to claim that the property is not the property of the firm.

But, in the present case, both parties claim title to the property in controversy under Wellman, — the plaintiff, under the mortgage of January 10, 1876, and the defendant, under the attachment of July 29, 1876. The defendant claims to hold the property not because it was ever really the property of Thayer & Wellman, or because Thayer ever had any interest in it, but because Wellman has so conducted himself that he is estopped to deny that it was the property of Thayer & Wellman; but both parties claiming under Wellman, the plaintiff is not estopped from showing the actual ownership of the property, and, the property being in fact the property of Wellman, the plaintiff's mortgage, being prior in point of time, is valid against the defendant's attachment.

Case discharged.

Stanley, J., did not sit.

GREEN, HUFFAKER, & CO. *v.* TAYLOR & SON.

98 Ky. 330: 32 S. W. 945. 1895.

Guffy, J. This action was instituted in the Pulaski Circuit Court by Green, Huffaker, & Co. against E. R. Taylor & Son to recover judgment on a claim of $286.35, and plaintiffs also sued out an attachment against the property of the defendants, which attachment was levied on a lot of merchandise as the property of defendants. The appellant E. J. Thistler, about the same time, brought suit in the police court of Burnside, in said county, against the defendants, and also procured a levy of an attachment on the same property, which suit was transferred, as provided by law, to the Pulaski Circuit Court, and consolidated with the suit of Green, Huffaker, & Co. against defendants. An order of sale was obtained, and the attached property was sold, and proceeds held subject to the final order of the court. The defendant E. R. Taylor answered, and substantially alleged that he alone constituted the firm of E. R. Taylor & Son, and was the individual owner of the goods levied on. That his son, R. L. Taylor, was a boy, under 21 years old, and was clerking for him, and by this means only was identified with him in the business. He also controverted the grounds of the attachment, and averred that he was a *bona fide* housekeeper, with a family, and that he had no provisions on hand to sustain his family for one

year, or any length of time, and that the goods levied upon were the only personal property that he owned out of which he could receive property in lieu of said provisions not on hand, and prayed that the attachment be dismissed, and that he be allowed the money realized from the sale of the attached property. Plaintiffs, in their reply, averred, in substance, that at the time defendants purchased the goods mentioned in their accounts, the defendants reported to them (plaintiffs) that they were doing business as merchants and partners under the firm name of E. R. Taylor & Son, and believing said representations to be true, and not knowing that R. L. Taylor was under 21 years of age, upon the facts of said representation believing that they were partners, did give them credit, and sell them the goods, the price for which is now sued for; that said defendants held themselves out to the world as partners; and that, if they (plaintiffs) had known defendants were not partners, they would not have sold the goods; and pleaded the said representations as an estoppel; also traversed all the material averments of the answer, and denied that any exemptions can be legally allowed defendant out of the proceeds of the said property. Appellants further charged that defendant retained in his hands, and converted to his use, and that of his family, notes and accounts more than sufficient to cover the amount allowed a housekeeper with a family.

The material averments in the reply were denied by the defendant in his rejoinder. The court, upon final hearing, rendered judgment in favor of the plaintiffs against E. R. Taylor & Son for the amount of their claim sued on, the same not being controverted, and sustained the attachments, but also adjudged that defendant E. R. Taylor was entitled to the money realized from the sale of the attached property, in lieu of provisions for himself and family. The defendant excepted to the judgment sustaining the attachment, and plaintiffs excepted to the judgment adjudging the fund aforesaid to E. R. Taylor, and to reverse same the plaintiffs prosecute this appeal, and appellee has taken a cross appeal from the judgment sustaining the attachment.

We have carefully read the evidence in support of the attachment, and we think that it sustains the judgment as to the attachment and the same is affirmed.

Appellants insist that the court erred in adjudging the proceeds of the sale of the attached property to E. R. Taylor. Appellees' contention is that E. R. Taylor was entitled to hold the goods levied on, under the statute allowing certain exemptions in lieu of provisions not on hand, and that, the property having been sold, appellee was entitled to the money realized by the sale. It is also claimed that the son, R. L. Taylor, was under 21 years of age, and in fact only a clerk in the store, and in fact had no interest in the goods, and that the firm name was only used as a matter of convenience. The proof, however, is conclusive that the appellees held themselves out to the world as partners, and purchased the goods, the price of which is sued for, from these plaintiffs, as partners, and also brought suits in the firm name of E. R.

Taylor & Son for debts due them as such; hence, they must be held and considered as a firm so far as this action is concerned, whether or not they were in fact partners. There was some claim that appellees had about $600 in notes and accounts, but that claim is not well proven, so the only question to be decided is whether or not one member of a firm can claim and hold partnership property under and by virtue of the exemption laws.

It is true that there is considerable conflict of authority on this subject, but, so far as we are advised, this question has never been decided by this court. Mr. Thompson, in his work on Homestead and Exemptions, discusses the question at some length, and refers to numerous decisions, some allowing the exemptions, and others disallowing the same, and, in conclusion, says in substance that the preponderance of authority is against allowing such claim of exemptions. § 216. This question is also discussed at length in Freeman on Executions, and, in conclusion, it is said: "But the tendency of the recent decisions to deny altogether the right to exemption out of partnership property or out of partnership assets is unquestionable, and we think irresistible." 1 Freem. Ex'ns, § 221.

The exemption given by the Kentucky statutes manifestly refers to and means property owned by the individual debtor. In case of a partnership, neither member has title to firm property, but the title is in the firm. It seems to us that our statutes, the weight of authority, and public policy all require the rule to be that partnership property cannot be claimed and held by any member of the firm as exempt from execution. It results, therefore, that the court below erred in directing the receiver to pay over to E. R. Taylor the money realized from the sale of the attached property. That judgment is therefore reversed, and cause remanded, with directions to set aside that judgment, and to adjudge that the said money be paid to the plaintiffs on their debts *pro rata*, or according to priority of liens, if there be any priority, and for proceedings consistent with this opinion.

Affirmed on cross appeal. Reversed on original appeal.

BIXLER ET AL. v. KRESGE ET AL.

169 Pa. St. 405: 32 At. 414. 1895.

Green, J. . . . On the question of the alleged partnership between Kresge and Oscar Green, the auditor finds, upon the testimony taken before him, and not contradicted, that, as between the men themselves, there never was any actual partnership; that while it is true Green permitted himself to be held out to the world as a partner, and therefore, if he were of age, he would be liable as such, in point of fact he was merely a hired man, working for fixed wages, and had no interest in the

business, or its profits or losses. He also finds that Green contributed no money or property to the concern, and that, while he signed some notes given for a stock of store goods, he paid nothing on the notes, and, being a minor who repudiated his obligations on account of his minority, he was subject to no legal liability upon the notes. The auditor also finds that the tract of timber land in Tunkhannock township was purchased by Kresge, and the title taken in his own name, and that he also bought a portable sawmill in his own name, paid all the money that was paid, both for the sawmill and on the land, and conducted all the lumber operations in his own name. These being the facts, and the present contest being a contention between individual and partnership creditors, the familiar doctrine becomes applicable that partnership creditors must work out their claims through the equity of the partner. If the partner has no equity, there is nothing to support the claims of the partnership creditors to the assets in question, as against the creditors of the individual partner who is the real owner of the assets.

In York Co. Bank's Appeal, 32 Pa. St. 446, there was a written agreement between the partners, establishing an actual and subsisting partnership, which was subsequently conducted publicly, with all the usual *indicia* of a partnership. But one of the partners had in fact not paid in any part of the capital, and the assets of the firm were in reality contributed by the other partner, whose property they were prior to the partnership. It was held that an individual execution creditor of the partner who owned the assets was entitled to preference in the distribution of the proceeds of the sale of the property of the firm, over a partnership execution creditor. Thompson, J., delivering the opinion said: "Between partners themselves, the assets of the firm constitute a fund for the payment of their liabilities, and each member has an equity which he can enforce to accomplish this result, and, of consequence, a lien on the property to this extent. . . . When a creditor levies on the property of a firm, his execution fixes and attaches to this right, to the same extent that it existed in the partners, and hence the preference over a separate execution creditor in the distribution. All this is predicable of a case of joint property only. But where there was no joint property the rule has nothing to operate on. The mere name is not enough, in such a case. There must be an equity. If that equity never existed, a creditor's execution could not attach to any right amounting to a lien, to have the assets appropriated to a partnership debt. That Moore has no interest in the firm property is found by the auditor. . . . This being so, the property levied on was individual property, in fact, though seized in the firm's name. The appellant cannot work out his equity through the partners, for they, as such, did not exist, *inter se*, and the individual owner could not give him this right over a prior execution against him individually." All this, and more, was said of a case in which there was an actual partnership, fully agreed upon, and really carried on for a number of

months. But in the case at bar there never was a partnership, as between the alleged partners, and this the auditor finds as a fact, upon undisputed testimony. In addition to that, Green never furnished anything to the firm, and therefore acquired no title to the firm property. He either signed or indorsed some notes with his individual name, but he paid nothing on them. On the contrary, he was paid a monthly compensation for his services as clerk or assistant. It is too plain for argument that, as between Green and Kresge, there never was, and never was agreed to be, any partnership relation. In point of fact, Green never contributed a dollar of money, or any article of property, to the partnership; and he never agreed or intended to do anything of that kind, nor could Kresge expect him to do so. The notes on which his name appeared not only were never paid by him, in whole or in part, but they did not appear on their face to be firm notes, and his liability could never be more than an individual liability. But, such as they were, he was a minor when he gave them; he had a legal right to repudiate them; and he actually did repudiate them, as soon as he attained his majority. We find it impossible to discover in the testimony any proof of the existence of any real equity in Green, as a partner; and therefore there is nothing upon which to build up a right on the part of any firm creditor to seize upon any firm property, as against an individual execution creditor of Kresge, who had acquired a prior lien upon the goods.

York Co. Bank's Appeal was repeated and reaffirmed in Appeal of Scull, 115 Pa. St. 141, where the facts were much stronger in favor of the firm creditors than they are in the present case. A careful reading of the whole record in the present case, including the arguments of the learned counsel on both sides, convinces us of the entire correctness of the conclusions reached by the auditor and the learned court below.

The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellants.

THAYER v. HUMPHREY: DAVIES v. HUMPHREY.

91 Wis. 276: 64 N. W. 1007. 1895.

On Nov. 3, 1891, the firm of J. D. Putnam & Co., consisting of Putnam and A. J. Goss, was dissolved, the firm and its members being insolvent. Although there was some confusion surrounding the sale, the majority of the court concluded that Putnam supposed he was selling his interest to J. B. Goss, and that such purchaser and his father, A. J. Goss, were to carry on the business in the name of J. B. Goss & Co.; that the sale of Putnam's interest was in form to A. J. Goss; that the latter then sold the business to J. B. Goss; that it was the inten-

tion of all three that the business and assets of J. D. Putnam & Co. should be devoted to the payment of the debts of the old partnership and of the new management; that A. J. Goss so conducted himself as to warrant the belief on the part of all persons doing business with J. B. Goss & Co. that there was a firm in fact as well as in name, and that "& Co." stood for A. J. Goss; that the ostensible firm assumed, by agreement with the creditors, nearly all of the debts of the old concern, and among them the debt of the appellant Lottie Thayer, but did not assume the debt of appellant Davies; that the ostensible firm incurred other obligations; that it was insolvent from the start; that J. B. Goss made an assignment for the benefit of creditors, as did A. J. Goss, who was also insolvent; that there was in fact no firm of J. B. Goss & Co., but that J. B. Goss was the sole owner of the business and its assets.

MARSHALL, J. (After stating the facts substantially as above.) Now in this situation can the creditors of J. B. Goss, doing business as J. B. Goss & Co., who were so circumstanced as to be entitled to hold J. B. Goss and A. J. Goss liable as members of an ostensible firm, . . . prove their claims *pari passu* with the individual creditors of A. J. Goss in his assignment? Also, can the creditors of the firm of J. D. Putnam & Co. so prove?

This presents interesting questions of law, some of which have not heretofore been presented to or decided by this court, — questions upon which there is such conflict of authority in this country that the true rule to be adopted has not been arrived at without difficulty, and then not with the unanimous decision of the court, which is to be regretted. Nevertheless, after careful consideration of the state of the law as held by the courts of this country and of England as well, we have, as we believe, reached a conclusion thoroughly grounded in the well-recognized principles of equity jurisprudence, which should be applied in the progressive spirit that ever has and should ever characterize the growth and application of such principles. They should not only not be lost sight of, but they should not be fenced in and restricted within such narrow limits as to lead to a suspicion of their correctness, but should be applied on such well-defined lines as to leave no doubt in respect to their true character and scope.

There are several propositions of law that apply which are well established, — too well to need to be more than stated, — among which are these: that the assets of an insolvent partnership, in insolvency proceedings, must be applied first to the payment of the partnership debts; that, generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner; that the fixed rule is that joint estate must go to joint creditors, and separate estate to separate creditors, though the former may prove *pari passu* with separate creditors, when there is no living solvent partner and no partnership assets. Now, in this case, there is no solvent partner. J. D. Putnam, J. B. Goss, and A. J. Goss are all insolvent. So, keep-

ing in mind the above stated propositions of law, the vital question is: Are there any partnership assets to which appellants can resort? If there are such, then the foundation stone upon which they construct their claim of right to share *pari passu* with the individual creditors of A. J. Goss, disappears.

On that subject we shall not attempt to harmonize the large number of cases that can be found in this country. The simple question of whether, when there is an ostensible firm, by holding out to creditors generally, the property of such firm is to be considered, in equity, joint property for the administration thereof, in insolvency, the same as if such property belonged to a firm in fact, is the key to the situation. That it ought to be so considered is, we assume, too clear for argument; that is to say, if A. and B. do business with persons generally as A. & Co., and incur liabilities to such persons, who deal in good faith, believing that there is a firm in fact as well as in name, and under such circumstances that they have a right to believe it is composed of A. and B., and the business becomes insolvent, the property of the ostensible firm should be considered, to all intents and purposes, in regard to the administration of the business in insolvency, under the control and direction of a court of equity, the same as if they were partners in fact. The doctrine that estops B. from saying that he is not a partner of A. at the suit of the creditors of the ostensible firm, should estop A. from holding that the property is his individual property, to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primarily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects, the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish, — to prevent fraud and promote justice between man and man in the administration of human affairs. And we are therefore prepared to find that such is the law as substantially declared by the Court of Appeals in Chancery of England.

(*Re* Rowland and Crankshaw, 1 Ch. App. 421, and *Ex parte* Sheen (*In re* Wright), 6 Ch. Div. 235, were discussed, and the judge continued.) In *Ex parte* Hayman (*In re* Pulsford), 8 Ch. Div. 11, the question again came before the Court of Chancery, on appeal from the chief judge in bankruptcy, and *In re* Rowland and Crankshaw was expressly approved. The case so clearly covers the two cases under consideration that we quote liberally from the opinion, after stating the facts. Such facts are as follows: Prior and up to August 31, 1875, Hayman, Catford, and Pulsford carried on business as Hayman, Pulsford, & Co. On that date the firm was dissolved, and notice was published stating the fact. At the same time a letter was sent to each of the persons with whom the firm had done business, stating the fact of dissolution, and that thereafter the business would be

carried on by Thomas Pulsford, under the style of Pulsford, Son, & Co. Thereafter the business was so conducted. Tom Pulsford, the son of Thomas Pulsford, took an active part in conducting the business up to the time the insolvency occurred, when Thomas Pulsford filed a petition in bankruptcy; and on the suggestion that, on account of the way the business had been conducted, it might be held that the father and son were partners, a petition was also filed by them as joint traders. The creditors resolved upon a liquidation by arrangement, and such resolution was registered. Hayman, a separate creditor of the father, in respect to matters outside the firm of Pulsford, Son, & Co., appealed from the order for a liquidation of the business as that of a firm, on the ground that there was no partnership. He prevailed, and the registration was cancelled, and the decree was not appealed from. Thereafter the father and son signed a declaration in insolvency, upon which Ravenscroft, a creditor, presented a petition alleging that they had treated father and son as partners, under the firm name of Pulsford, Son, & Co., on which an adjudication was made against them by consent. Hayman then appealed to the court to annul the adjudication. On this application, following *In re* Rowland and Crankshaw, the application was dismissed on the ground that, though no actual partnership had subsisted between father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as to enable him to maintain the adjudication. This decision was not appealed from. Hayman then applied to the court for an order declaring that all, or such portion as the court should think proper, of the estate which appeared in the acts of the bankrupts, or either of them, as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly as separate estate of the father. Hayman was the only separate creditor; that is, creditor outside those of the business of Pulsford, Son, & Co. On the hearing, the evidence showed that substantially all the creditors did business with Pulsford, Son, & Co. as a firm consisting of the father and son, though it appeared that the father was the actual owner of the business, and that there was no firm in fact. Hayman's application was refused, and he appealed. On the hearing of this appeal in the chancery division of the High Court of Justice, James, L. J., propounded to appellant's counsel the following interrogatory: "If I go to a shop, and find the names Thompson & Jones on the door, and I go in, and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?" to which answer was made in effect: "That would not change the nature of the assets, and make property which belonged to the father in fact the joint property of father and son," — just as it is claimed in this case, it will be observed. Appellants contend that the fact of holding out sufficient to constitute an ostensible firm of J. B. Goss & Co. will not change the nature of the assets so as to make the individual property of J. B. Goss joint property, in equity, of J. B.

Goss & Co. The positions are identical. In the opinion of the court this is answered by James, L. J. After reciting the facts in *Re* Rowland and Crankshaw, as in Lord Cranworth's opinion in that case, he says: "Every point of that judgment applies to this case, with this single exception, which fact is in favor of the decision of the registrar, that, instead of the words used being '& Co.,' which is an ambiguous term, and might mean anybody in the world, the words are 'Pulsford, Son, & Co.' But it is said that this conclusion will work hardship to the appellant, who is a creditor of the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterwards become insolvent and become bankrupt, having partners. The hardship would have been exactly the same upon Hayman if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership." [1] It will be distinctly noted at this point that the court makes no distinction in the administration of estates of an ostensible and an actual firm in bankruptcy. The Lord Justice proceeds: "The rule has been established that joint creditors take the joint estate, and separate creditors take the separate estate; and you only have to consider what is joint and what is separate estate; and you must apply the rule independently of the hardship. The supposed hardships are those which it may inflict in any particular case. We can only apply the fixed rule that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors."

The reasoning of these cases is, in our opinion, unanswerable, and we deduce therefrom the principle of law that, if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted the two as partners and the business as that of the two. To the same effect is Van Kleeck *v.* McCabe, 87 Mich. 599. Applying the law thus stated to the question under consideration, the conclusion

[1] The Lord Justice added: "What is joint estate and what is separate estate is also affected by the doctrine of reputed ownership. It is said that that doctrine does not apply to a case of this kind. I am of the opinion, however, that that doctrine was really the foundation of Lord Cranworth's judgment, *In re* Rowland and Crankshaw, L. R. 2 Q. B. 474. And Thesiger, L. J., said: 'I do not see how upon any doctrine of ostensible partnership founded on estoppel, there can be a greater right in the one case' (of joint creditors) 'than in the other' (of separate creditors). But if the difference is founded on the doctrine of reputed ownership, then it seems to me consistent with all the authorities that the estates should be treated as joint estate, and that a separate creditor should have no right to come into competition with the joint creditors." — Ed.

is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact.

This effectually disposes of the appeal of appellant Lottie Thayer, though it is as effectually ruled by the law applicable to the Davies appeal, as will appear by what follows. Appellant Davies never became a creditor of J. B. Goss, or of J. B. Goss & Co., by any agreement to which he was a party; and, while his appeal presents the question of whether there is any joint property to which he can resort, such question involves a different question from the one discussed as particularly applicable to the Thayer appeal.

We must start the discussion of the Davies appeal with the propositions of law — in respect to which, though there is some conflict, they are too well established by the great weight of authority to be questioned by this court — that partnership creditors have no lien on the partnership assets independent of the equity of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members; that, so long as the equity of the individual members of the partnership exists to have the partnership property applied to the partnership debts, the creditors have the equity to compel its enforcement; that if one member sells his interest, *bona fide*, to his co-partner or a stranger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser. The question to be determined is, in view of the facts that the sale was made by Putnam in consideration of the debts of the partnership being paid; that the firm was insolvent at the time; that the whole transaction was really made by him to relieve himself from the partnership liability; that the property was put into the possession of J. B. Goss for the purpose of continuing the same business with the same assets, and effect a settlement of the old partnership affairs, — all of which clearly appears, — can it be held that the equitable title to the property was changed, so as to affect the equitable right of Putnam to have the creditors of the old firm paid out of it, or were the equitable rights of the outgoing partner and the creditors preserved by reason of the facts, and the assets in the hands of J. B. Goss impressed with a trust to carry out the intention of the parties?

In discussing these questions, full effect should be given to the significant controlling words, in the rule correctly stated in Willis *v.* Thompson, 85 Tex. 301, "without preserving the lien in any manner." In Conroy *v.* Woods, 13 Cal. 626, it was held that where a sale is made by one partner to his co-partner, and the consideration for the sale is the payment of the partnership debts, the sale is not *bona fide*, within the meaning of the rule, so as to cut off the equity of the vendor to have the property applied to the payment of the partnership debts.

Very few cases can be found that go as far as the California court on this subject, except in the New Hampshire court, which does so, holding that the creditor has an equitable interest independent of the equity of the individual partner. In *Ex parte* Cooper, 1 Mont. D. & D. 358, and *Ex parte* Williams, 11 Ves. 3, it is held that where an outgoing partner sells *bona fide* to his co-partner, and takes for his consideration an agreement that the purchaser shall pay the debts, no equitable interest in the property is retained. To the same effect are Stanton *v.* Westover, 101 N. Y. 265; Fulton *v.* Hughes, 63 Miss. 61; Dimon *v.* Hazard, 32 N. Y. 65; and many other cases that might be cited. In Darby *v.* Gilligan, 33 W. Va. 246, it is held that where a firm is insolvent, if a partner sells out to his co-partner, and the purchaser agrees to pay the firm debts, the sale cannot be considered *bona fide*, so as to cut off the equity of the firm creditors to be preferred; and to the same effect is Olson *v.* Morrison, 29 Mich. 395. In the latter case Olson and Jones were partners. Olson sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with his agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement, and to subject the property to the payment of the partnership debts. Held, that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the equitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity.

In Menagh *v.* Whitwell, 52 N. Y. 146, it was held that, as between the firm and its creditors, the title of the former to the joint property is not devested by any separate transfers to outside parties for the individual benefit of the respective vendors, and that, when there has been no transfer by the firm as such, conveying the corpus of the property, and it remains in specie, though transferred by the separate transfers of the individual members, it may yet be followed and reached in the hands of those claiming under such separate transfers, by creditors of the firm. This is upon the theory that neither partner separately has any interest in the corpus of the property; that his interest is limited to his proportionate share of what remains after a settlement of all partnership obligations and an accounting between himself and his co-partner. A distinction is drawn in this case between a *bona fide* sale by one of a partnership to two of his co-partners without reservation, which, under the prevailing rule of *Ex parte* Ruffin, 6 Ves. 119, operates to liberate the assets from the partnership liability, and a sale made by one member of a firm of more than two, to one of the partners, or to an outside party. In that class of cases the New York courts have uniformly held, since Menagh *v.* Whitwell, that the partnership effects are not liberated from the partnership liability. In this case, if it is held that the sale was really to J. B. Goss, under the New York rule, the corpus of the property never passed by any act

of the firm, so as to change the equitable title in respect to creditors existing at the time of the sale.

The trend of the New York cases, since Menagh *v.* Whitwell, has been to extend the rule which preserves the equity of the creditors in case of the sale by one of the members of an insolvent firm, the purchaser assuming the partnership obligations in place of the outgoing partner, whether such sale is to a co-partner or otherwise. This clearly appears by the following, from the opinion in Bulger *v.* Rosa, 119 N. Y. 465: "The equity of the firm creditors cannot be defeated by any attempted conversion of the assets of the insolvent firm into the individual assets of one of the partners, through a transfer by one partner of his interest therein to the other. In such a case, till the assets come to the hands of a *bona fide* purchaser, the same can be reached by the partnership creditors." To the same effect are Nordlinger *v.* Anderson, 123 N. Y. 544, and Peyser *v.* Myers, 135 N. Y. 599. In the latter case there had been a change in the firm some time prior to the assignment for the benefit of creditors, the new firm not having made any express contract to pay the old firm debts. There were two sets of creditors, and, in discussing the subject of their equitable rights, the court said: "The priority of the lien of firm creditors is not devested by the transfer by an insolvent firm of the assets to one or more of the partners, nor can it be affected by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of another." . . .

We might go on at great length, reviewing decisions on this subject, and cite numerous authorities where outgoing partners have been held to retain their equity to have the firm debts paid, and the rights of the creditors to the assets which have come under the control of equity have been worked out through the equity of such partners. Probably there are few questions upon which there is such a conflict of authority as the one under consideration; but nearly all are in harmony with the principle that if the *bona fides* of the transaction is impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity. The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partnership assets, and impress a trust upon such assets for that purpose.

By the mere fact of the dissolution of a partnership by one member selling out to his co-partner or to a stranger, the purchaser or purchasers agreeing, as consideration for the purchase, to pay the partnership debts, the firm being insolvent at the time, no presumption of a *bona fide* agreement arises which will operate to change the equitable title of the property; and such agreement must clearly appear to exist inconsistent with the continuance of the equitable rights of the partner, and, through him, of the partnership creditors; else it is retained.

Lindl. Partn. 699. If the circumstances are such as to show that the property was merely transferred for the purpose of winding up the affairs of the concern, there being no express agreement that the property shall be exclusively that of the vendee, it will, in case of bankruptcy, be distributed as joint estate. Id. 699, 700. This is upon the presumption that such was the intention of the parties. The presumptions to be indulged in, in such cases, rather go to support an implied agreement to do what in equity and good conscience the parties ought to do. In Sedam *v.* Williams, 4 McLean, 51, and Marsh *v.* Bennett, 5 McLean, 117, it was held that the equity was retained to have the partnership creditors paid out of the partnership assets, and that such assets were impressed with a trust for that purpose by virtue of an express agreement. In *Re* Dawson, 59 Hun, 239, which does not appear to have been appealed from or criticised, it was held that where one member of a firm retires, selling out his interest to a third party, who continues the business with the remaining partner, with whom he enters into partnership, and the partnership assumes the debts of the previous firm, and such new firm becomes insolvent, and makes an assignment for the benefit of creditors, the property transferred to the new firm becomes charged in equity with a trust for the payment of the debts of the old firm, which the outgoing partner may enforce. Such holding is certainly equitable and just when applied to a state of facts, as in this case, which leaves no room for doubt but that it was the intention of all the parties dealing with the property to preserve and administer the partnership assets in the nature of a trust to liquidate the old debts; and to this extent we expressly approve of and apply it here.

This does not in the least trench upon the rule that if a partner sells out, *bona fide*, his interest in the partnership assets and business, without in any manner retaining his equity to have the partnership creditors paid out of such assets, he waives his equity in that regard, but is perfectly consistent with it. If the agreement was express that the debts shall be paid out of the assets, then the equity is retained by express contract; if the circumstances of the transaction show that the contemplation of the parties was that the debts should be so paid, then the equity is retained by implied agreement; and the assets are, in the administration of the affairs of the purchaser in insolvency, as effectually impressed with a trust in favor of the vendor, and, through him, the creditors of the old partnership, in the one case as in the other. The circumstances involved in these appeals point unerringly to the conclusion that it was the intention of J. D. Putnam, J. B. Goss, and A. J. Goss that the new concern of J. B. Goss & Co. should continue the old business with the same assets, for the primary purpose of winding up such business and liquidating the debts theretofore contracted in it out of the old assets, so far as practicable. Hence the court below, sitting as a court of equity in the administration of the affairs of A. J. Goss and J. B. Goss, was warranted in concluding that the property

of J. B. Goss is impressed with a trust to carry out the intention of all the parties concerned in the dissolution of the old firm, and formation of the new concern of J. B. Goss & Co.; that the debts of the old firm should be assumed by the new concern, and be paid out of the property turned over to it, and the operations of the business, so far as this can be done with due regard to the equities of the creditors who trusted such new concern.

On the subject of whether the two sets of creditors — those of the old firm of J. D. Putnam & Co., and those of the ostensible firm of J. B. Goss & Co. — can all prove in the insolvency proceedings of J. B. Goss, though that subject need not be decided here, we cite *Ex parte* Chuck (*In re* Starkey & Whiteside), 8 Bing. 469, an early English case, which covers the subject; and, so far as we are able to find, it has never been criticised or overruled. The facts were that S. & S. had been doing business for some time as co-partners, and were, as such, indebted to various persons. They took in W., and thereafter the business was conducted by S., S., & W., as co-partners. The new firm became bankrupt, and there were creditors of both the old and the new firm as well. The court held substantially as follows: "We are of the opinion that the creditors of S. & S. and those of S., S., & W. should be admitted to prove *pari passu* upon the joint assets of the new firm." To the same effect is *In re* Frow, Jacobs, & Co.'s Estate, 73 Pa. St. 459. Foresman sold out his interest in an existing firm, having creditors, to the remaining members, who agreed to pay the debts. The vendees continued business as a firm with the same assets for a time, and finally made an assignment for the benefit of creditors. Held, that the two sets of creditors — those of the old firm and those of the new firm — might prove *pari passu* against the assets of the new firm; that Frow, Jacobs, & Co. were liable for the debts as partners in the firm of Foresman & Co., which they took upon themselves when Foresman retired from the firm, and they continued the business. When Foresman sold out, the purchasers intended to continue the business. They took all the assets, and assumed the debts. The assets became the capital of the new firm, and the old debts became its debts. Under these facts, the court readily reached the conclusion that the creditors of the old and of the new firm should stand on an equal footing in the settlement of the new firm in bankruptcy. To the same effect are *In re* Dawson, 59 Hun, 239; Shedd *v.* Bank, 32 Vt. 709; Filley *v.* Phelps, 18 Conn. 294; and Wright *v.* Carman, 19 N. Y. Supp. 696. Held, in the latter case, and in Frow, Jacobs, & Co.'s Estate, *supra*, and *In re* Dawson, *supra*, that the debts of the old became, by reason of the facts, the debts of the new firm. To the same effect is Peyser *v.* Myers, 135 N. Y. 599, where it is distinctly held that if there is a change in the personnel of an insolvent firm, and it subsequently makes an assignment for the benefit of creditors, — there being an agreement, express or implied, at the time of the change, that the new firm shall assume and pay the old debts, — the equity of the old creditors is equal

to that of the new. There was no express agreement in that case, but the court held that there was an implied agreement.

This effectually disposes of all the questions presented, and leads to the conclusion that neither of the appellants can prove *pari passu* with the individual creditors of A. J. Goss in his assignment, but they can both prove *pari passu* with all the creditors of the ostensible firm of J. B. Goss & Co. in the assignment of J. B. Goss.

This opinion has been quite lengthy, but it may be well justified from the importance of the questions involved. In reaching the conclusion arrived at by the majority of the court, we resort to cases merely to determine what well-defined principles have been established applicable to the facts of the appeals before us. Having come to a satisfactory conclusion in that regard, we endeavor to broadly apply them, so as to satisfy effectually the ends of justice, which are obviously the legitimate ends for which such principles have been worked out in the growth of equity jurisprudence. By so doing, the assets of J. B. Goss, held and used by him as those of the ostensible firm of J. B. Goss and A. J. Goss, will be marshalled and administered along definite lines, without confusion or uncertainty as to the rights of the various sets of creditors and parties interested.

In order, now that the principles of equity jurisprudence here applied may definitely appear, we recapitulate as follows:

1. In the administration of the affairs of a partnership and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu.*

2. Partnership creditors have no "lien," strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership, through the equities of such members.

3. If one of a partnership sells out, *bona fide*, his interest to his co-partner or to another, without in any way retaining his equity to have the partnership creditors paid out of the assets, the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees expressly or impliedly to apply the assets to such purpose.

4. The word "assets," used in No. 1, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts, under the well-defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

5. Those who deal with persons representing themselves to creditors

generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

6. If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts, and to wind up the old partnership concern, by the payment of the debts of such concern out of the partnership assets, and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

7. If one of the members of an insolvent firm sells out his interest to an outside party or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way with substantially the same assets, and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, in the administration of the assignment the creditors of the old and the new firm may prove their claim *pari passu*, and be preferred over individual creditors of the members of such new firm.

BY THE COURT. The orders appealed from are affirmed, and the causes remanded for further proceedings according to law.[1]

[1] In a dissenting opinion, NEWMAN, J., said (PINNEY, J., concurring): "These considerations seem to show sufficiently that there are no joint assets of Alfred J. Goss and James B. Goss, and so that the petitioner has the right to go against the individual assets of either in the hands of their respective assignees. The case properly ends here. This covers all the issues tried, and on which there was evidence. . . . It may be true — it is not necessary to question it — that Alfred J. Goss is estopped, as against this petitioner, to deny that he was a partner with James B. Goss, and that there were, in fact, partnership assets. . . . It is said that James B. Goss is also estopped to deny the alleged partnership and the joint ownership of the property used in it. But the court has not listened yet to James B. Goss's side of that question. . . . But it is not very important whether James B. Goss shall, when the question is presented, be held to be estopped or not. A much more important question will be whether his individual creditors are estopped from claiming that these assets, which are in the hands of his assignee for their benefit, were really his individual assets. No one questions that they were his individual assets in law, and they are his individual assets in equity, unless these individual creditors are estopped to claim them as such. Now, there really is no evidence in the case which shows the nature of these debts to the individual creditors of James B. Goss. In this condition of the case, it certainly cannot be prudent to decide this question of which set of creditors have the superior equity to these assets."

BROADWAY NAT. BANK *v.* WOOD ET AL.

165 Mass. 312: 43 N. E. 100. 1896.

Bill in equity by the indorsee of a note of Harry F. Faden & Co. for $2,160, to restrain defendant Wood, as trustee for creditors of Leatherbee & Son, from disposing of certain property; and to compel him to apply such property to the payment of said note.

Robert T. Babson, for the plaintiff.

H. W. Chaplin, for the defendants.

Allen, J. On the averments of the bill it must be assumed that Faden was an ostensible, but not an actual, partner, and that the property which the plaintiff seeks to reach and apply to the payment of its debt was in fact owned by the two Leatherbees. Assuming that Faden was and is personally liable to the plaintiff, as ostensible partner, on the ground of estoppel, it is contended that this has the effect to entitle the plaintiff, as a creditor of the ostensible firm, to have the property which was in the possession and use of that firm applied to the satisfaction of the creditors of that ostensible firm in priority to creditors whose claims are only against the two Leatherbees. There are some decisions which support or favor this view. Kelly *v.* Scott, 49 N. Y. 595; Hillman *v.* Moore, 3 Tenn. Ch. 454; Whitworth *v.* Patterson, 6 Lea, 119. But the weight of authority, and the better reason, as we think, are the other way. The estoppel is a personal one. An ostensible partner cannot be included in insolvency proceedings instituted by the actual partners. Hanson *v.* Paige, 3 Gray, 239. He cannot interfere in the management of the partnership business and obtain an injunction or a receiver. Nutting *v.* Colt, 7 N. J. Eq. 539; Kerr *v.* Potter, 6 Gill, 404. He has no lien on the partnership assets. Stone *v.* Manning, 2 Scam. 530. The long-established equity of joint creditors to be paid in priority out of the joint funds is usually said to be by way of substitution to the rights of the partners *inter sese*, and, where no such right exists, then the creditors have no such equity. This doctrine is so firmly established that it is too late now to question it. Story, Eq. Jur. §§ 675, 1253; Howe *v.* Lawrence, 9 Cush. 553, 558, 559; Harmon *v.* Clark, 13 Gray, 114, 121; Robb *v.* Mudge, 14 Gray, 534, 539; Case *v.* Beauregard, 99 U. S. 119, 125; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 654; Huiskamp *v.* Wagon Co., 121 U. S. 310, 323; Saunders *v.* Reilly, 105 N. Y. 12, 19, 20; Brown *v.* Beecher, 120 Pa. St. 590, 607, 608; Washburn *v.* Bank, 19 Vt. 278; Rice *v.* Barnard, 20 Vt. 479; Couchman's Adm'r *v.* Maupin, 78 Ky. 33; Farley *v.* Moog, 79 Ala. 148; Iron Works *v.* Davidson, 73 Cal. 389, 392; Grabenheimer *v.* Rindskoff, 64 Tex. 49. It has also been held in England that when trustees who are authorized to carry on business contract debts, their creditors can only resort to the trust fund when the trustees are entitled to be indemnified therefrom, and that the creditors reach it only by being substituted to the equities of the trustees. See *In re* Johnson,

15 Ch. Div. 548, and Dowse *v.* Gorton, 40 Ch. Div. 536, cited in Mason *v.* Pomeroy, 151 Mass. 164, 167.

In applying the foregoing doctrine to cases where a person is ostensibly, but not actually, a member of a partnership, and is, therefore, under a personal estoppel to deny his liability, it follows that a creditor who, by reason of this estoppel, can maintain a personal action against him, cannot extend this estoppel so as to bind the property which was in the possession and use of the actual partners. The ostensible partner himself has no equity to have this property applied to the payment of the claims upon which he is liable, and therefore the creditors holding those claims who are merely subrogated to his rights and equities have no such equity. Kerr *v.* Potter, 6 Gill, 404; Glenn *v.* Gill, 2 Md. 1; Reese *v.* Bradford, 13 Ala. 846; Scull's Appeal, 115 Pa. St. 141; York Co. Bank's Appeal, 32 Pa. St. 446; Swann *v.* Sanborn, 4 Woods, 625.

The result is that the decree sustaining the demurrer and dismissing the bill was right.

Decree affirmed.

CHAPTER III.

THE NATURE OF A PARTNERSHIP.

§ 1. The Firm: Its Members: Its Name.

BLECKLEY, Ch. J., in DRUCKER *v.* WELLHOUSE.

82 Ga. 129, 132. 1888.

In contemplation of law there is no merger or fusion of the several persons composing a partnership into a common and comprehensive person including them all. A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world. Still the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issued for and against it. Code, §§ 1899, 3576. Attachment may issue against it as non-resident, Chambers *v.* Sloan, 19 Ga. 84; De Leon *v.* Heller, 77 Ga. 740; or as absconding, Hines *v.* Kimball & Co., 47 Ga. 587. It may be served with process. Peel *v.* Bryson, 72 Ga. 332. It may be taxed. Mayor *v.* Hines, 53 Ga. 616; and see many provisions in the session laws imposing taxes. It may be insolvent. Code, § 1918; Bennett *v.* Woolfolk, 15 Ga. 213; Daniel *v.* Townsend, 21 Ga. 155; Pullen *v.* Whitfield, 55 Ga. 174; Anderson *v.* Pollard, 62 Ga. 51. It may assign its property to pay its creditors. . . . We may safely hold that though a firm is impersonal or non-personal, it is for some purposes, in contemplation of law, a *quasi* person, having powers and functions exercisable by one of the partners severally, or all of them jointly. That it may be a debtor, or a creditor within the meaning of modern statutory enactments, we have no question.

MICK *v.* HOWARD.

1 Ind. 250. 1848.

Smith, J. Upon the trial, the plaintiff gave in evidence a sealed note, filed as the cause of action made by the defendant in favor of "J. S. Allen and H. H. Hays," and indorsed "Allen & Hays." The plaintiff proved that, at the date of the note, and for about a year after that date, the payees were partners, who transacted business under the firm name of "Allen & Hays," and that the indorsement was in the handwriting of Allen. This being all the evidence, the plaintiff offered

to read the indorsement in evidence, but the court refused to permit him to do so, and, as it would appear, for want of sufficient proof of the assignment, gave judgment for the defendant.

It is contended by the defendant that as the note was not made payable to Allen & Hays in their firm name, it must be regarded as individual and not partnership property, and, therefore, that there should have been further proof that Hays assigned it, or authorized its assignment to the plaintiff. We cannot perceive any good reason for this distinction. A partnership note or bill may be made by one of the partners signing it for "himself and partners," or by subscribing the several names of the persons composing the firm or the firm name. Chitty on Bills, 67. So, no doubt, a note may be made payable to partners by inserting their individual names in full, or the firm name, and upon the same principle, an assignment by one of a firm made in either way would be good. The case of Jones *v.* Mars, 2 Campb. 305, was a suit by indorsees against the drawers of a bill of exchange. The declaration stated that the defendants "made their certain bill of exchange in writing, their own proper hands being thereunto subscribed." The bill, when produced, appeared to be drawn in the defendants' firm name of "Mars & Co.," and it was held that this was not a variance.

As there appears to have been no other defect in the proof, we think the plaintiff was entitled to a judgment upon the evidence adduced.

Judgment reversed.

WEST ET AL. *v.* THE VALLEY BANK.

6 Ohio St. 168. 1856.

WEST & Co. drew a bill for $5,000, at Cincinnati, addressed to "Taylor & Cassily, New Orleans," and sold it to The Valley Bank. Taylor & Cassily were a firm having business houses in Cincinnati and New Orleans, — Taylor living in New Orleans, and Cassily in Cincinnati, and the two houses keeping distinct accounts with each other and with their respective customers. The draft was accepted in Cincinnati by Cassily for, and to be paid by, the New Orleans house. It was passed to other parties by the bank, and was not paid at maturity. The bank took it up, paid the holders the full amount thereof and 6 per cent statutory damages; for which amount it brought this suit, and recovered judgment. The Ohio statute provided that upon the legal protest of a bill for non-payment, the drawer, etc., shall be subject to the payment of "6 per cent damages thereon, if drawn on any person or persons, or body corporate, within the jurisdiction of the United States, and without the jurisdiction of this State," etc. Defendants appealed.

Coffin & Mitchell, for plaintiffs in error.

Collins & Herron, with *Allen G. Thurman*, for defendant in error.

Scott, J. (After a statement of the facts of which the foregoing is an abridgment, and a discussion of the purpose of this statute, including references to Farmers' Bank *v.* Brainerd, 8 Ohio, 292; Clay *v.* Hopkins, 3 Marsh. 488, and Grimshaw *v.* Bender, 6 Mass. 157, said:) The bill in question was not drawn upon the natural persons composing the firm of Taylor & Cassily, but upon the firm itself, that ideal, mercantile person known to the world as Taylor & Cassily, to whom it was addressed as domiciled at New Orleans: and by whom, as such firm, so domiciled, it was accepted. In the foreign character thus given to this bill, there was nothing fraudulent or false. The firm of Taylor & Cassily have a distinct branch of their mercantile house domiciled and actively engaged in business at New Orleans. . . . Upon this branch of the firm the bill was understood to be drawn; for this branch it was accepted; at its place of business it had to be presented for payment; and there it was expected, in good faith, to be paid. Under these circumstances, we think the bill in question comes clearly within the spirit of the statute; it was drawn on a mercantile "person without the jurisdiction of this State." . . .

Judgment affirmed.

Bartley, C. J., and Swan, Brinkerhoff, and Bowen, JJ., concurred.

MESSNER *v.* LEWIS et al.

20 Tex. 221. 1857.

Suit by Lewis, Garthwaite, and Grant, partners trading in New York under the name of Lewis, Garthwaite, & Co., and in New Orleans under the name of Grant, Lewis, & Co., against Messner on three notes, one payable to Lewis, Garthwaite, & Co. and two to Grant, Lewis, & Co. The answer contained a demurrer on the ground of misjoinder. Demurrer overruled; judgment for plaintiffs.

J. D. & D. C. Giddings and *A. M. Lewis*, for plaintiff in error.

G. W. Horton and *J. E. Shepard*, for defendants in error.

Wheeler, J. It is no objection to the petition, that the plaintiffs join in their suit several demands for debts contracted with them by the defendant in different firm names. They sue in their individual, not in their partnership names; and as the same persons were the parties to the several contracts, it is quite immaterial by what, or how many different names they may have transacted their business: they are still the same contracting parties, and the proper parties to bring suit upon their contracts, under whatever names contracted.[1]

[1] A part of the opinion, in which questions of practice are considered, has been omitted. Cf. Second Nat. Bank *v.* Burt, 93 N. Y. 233 (1883).

Ex parte CORBETT. In re SHAND.

14 Ch. D. 122. 1880.

In 1864, Corbett granted to F. Shand, C. Shand, A. Shand, and R. A. Robinson, who were partners, a lease of six rooms in No. 23 Rood Lane, London, for a term of nearly fourteen years; the lessees jointly and severally covenanting to pay the rent and repair the premises. F. Shand died, and the business was thenceforth carried on in partnership by the other three lessees in the same rooms until, on Aug. 12, 1875, they were adjudicated bankrupts. The trustee in bankruptcy disclaimed the lease. Corbett tendered a proof against the joint estate of the bankrupts, and also against their separate estates, for £396 2*s.* 6*d.* The registrar ordered the proof to be admitted against the joint estate only. The lessor appealed.

Higgins, Q. C., and *H. A. Gifford*, for the appellant.

J. Pearson, Q. C., and *Finlay Knight*, for the trustee.

James, L. J. This 23d section is really one of great difficulty, as are all the sections of the act which deal with the peculiar powers given to trustees in bankruptcy to interfere with the rights of lessors and other persons. But I think we can see our way to decide in accordance with the justice and common sense of the matter.

Of course we start with this fact, that the trustee wants to get rid of the lease, that it is a *damnosa hœreditas*, and, therefore, it never could have been, for any practical purpose, any part of either joint or separate estate. It was, in truth, nothing but a liability, but, under the operation of this section, the trustee disclaims the liability so as to put an end to the lease as between the lessor and the lessees.

Now, independently of the bankruptcy law, whose lease was it that he was disclaiming? It was not the lease of the firm, because there is no such thing as a firm known to the law. The firm, as *cestuis que trustent,* might have been the beneficial owners of the lease, but the legal estate in the lease was vested in three joint tenants, A., B., and C., who happened to be in business together, and unfortunately happened to become bankrupt. The trustee, who is the trustee of the joint estate as well as of the separate estates, is the trustee of the property of A., B., and C., and he is authorized, although he may have done some act which under the old law would have bound him to elect to take the lease, to disclaim it. He is authorized to release the bankrupts from all the liability under which they would have been if the lease had not been surrendered. Then he, under that statutory power, surrenders the lease against the will of the lessor, and the lessor is obliged to accept the surrender. For whom is he surrendering it? He is surrendering it for the three joint tenants whose lease it was; he is surrendering it for them and for each of them. Each of them was possessed of the lease *per my et per tout.* That being so, the legislature has said: You may, on behalf of those persons, surrender the lease

entirely, and put an end to it, as between the lessor and the lessee. The lessor has certain remedies against his lessees. But the legislature says to him, instead of those remedies, you may prove against the estate of the bankrupt. Of course the word "bankrupt" may mean plural or singular, or plural and singular, according to the context. But sect. 23 says: You may have a right of proof against an estate for the damage you have sustained. It is not very much we give, but we do give you a right of proof for the amount of the damage you have sustained. Against whom is he to prove? He is to prove against the bankrupt whose trustee has disclaimed. It seems to me that in this particular case no question of joint and separate estate can arise, because there is no joint estate of the joint contractors so as to bring in the 37th section. There were four persons who covenanted jointly, and there is no joint estate of those four. How the case would have stood if the three bankrupts had entered into the joint covenant it is not necessary for me to say. But here there is a distinct liability of each of the three bankrupts on their covenant, and that liability has been put an end to by the act of the trustee. The act of the trustee has enured to the injury of the lessor. The lessor has a right of proof. Against whom? It seems to me it must be against the estates of the persons upon whose behalf and for whose benefit the lessor has been made to endure this injury, that is to say, he is entitled to prove against the separate estate of each of those three persons. That, as it appears to me, would have been the proper order for the registrar to make, and no proof ought to have been admitted against the joint estate.

BRETT, L. J., and COTTON, L. J., delivered concurring opinions.

HASKINS *v.* D'ESTE ET AL.

133 Mass. 356. 1882.

W. ALLEN, J. The Statute of 1877, c. 163, provides that "any signature to a written instrument declared on or set forth as a cause of action or ground of defence or set-off, in an action at law, shall be taken as admitted, unless the party sought to be charged thereby shall file in court, within the time allowed for answer, a special denial of the genuineness of such signature and a demand that the party relying thereon shall prove the same at the trial."

The two defendants were sued in a writ which describes them as "late co-partners under the firm name and style of D'Este & Co.," and the declaration alleges that they made a promissory note signed "D'Este & Co." One of the defendants, McKenzie, did not appear, the other, D'Este, appeared and filed a general denial. The question is, whether the signature is to be taken as admitted to bind D'Este, or whether it is only admitted as the signature of a co-partnership of

D'Este & Co., and the plaintiff, to hold D'Este, must prove that he was a member of the firm whose signature he admits. The question is precisely what it would have been if both defendants had appeared and filed a general denial in answer. The admission is the same, as to those making it, whether made by both defendants together, or separately, or by one alone.

A partnership is not a person distinct from its members, like a corporation. A partnership cannot be sued; a suit must be against the individuals composing it, and each individual stands, as to proof of his liability, as if he were sued alone. In either case, his personal liability upon the joint undertaking would have to be made out, and, in either case, the allegation of partnership would but express the relation between the co-partners, and the relation of co-partners to each other, as affects their liability to third persons, is simply one of agency. The allegation that a number of individuals as members of a co-partnership made a contract, is only the allegation that each of them, personally, or by his agent, made it, and the agency is alleged and proved by the co-partnership.

In the case at bar, the substantial allegation is that each of the defendants made a joint note in the name of D'Este & Co., that is, that each of them signed that name to the note. The allegation of co-partnership amounts only to a statement that each of the defendants was authorized to sign that name for both, and that an agent might be authorized to sign it for both. This is the whole significance of the firm name. It is a name which the partners adopted, by which each could, in certain matters, bind the other with himself, or another agent might bind both. It was simply a convenient abbreviation of their two names, and when used had the same effect as if no firm name had been adopted, and the name of each partner had been signed in full as a partner; and it bound each only because he had adopted it as his name, and authorized its use for the purposes for which it was used. When the defendant D'Este admits the genuineness of the signature, he does not admit it to be a mere name, — he admits it to be a sign-manual, the name of a person signed, and the only question is, Whose name does he admit it to be? The answer is plain; he admits it to be the genuine signature of the persons whose signature it is alleged in the declaration to be. The declaration does not allege that the firm made the note; it alleges that the defendants, D'Este and McKenzie, in the name of D'Este & Co., made, that is, signed, the note; that it is the genuine signature of both in the name they had adopted for binding themselves jointly. It is said that it is not alleged that the note was signed by the defendant D'Este personally, and that he may not have been one of the persons doing business under the name of D'Este & Co. But it is alleged that the two defendants, one of whom is D'Este, made the note in that name. If the allegation had been that the defendant D'Este, doing business in the name of John Doe, had made the note in that name, it would hardly be contended that the genuineness of his

signature would not be admitted, because there might have been another person doing business in that name whose signature it might be; nor because the signature might have been made by an agent, and not by the defendant personally. The declaration alleges that the defendants made the note. If the writ is taken in connection with the declaration, there is, so far as the question in issue is concerned, only the further allegation, in effect, that the two defendants held such a relation to each other that each had authorized the other to bind him in a joint note, by the name of D'Este & Co. We think the signature is alleged to be that of the defendant D'Este; and that its genuineness, not having been denied, must be taken to have been admitted. See Wilkes *v.* Hopkins, 1 C. B. 737; Mahaiwe Bank *v.* Douglass, 31 Conn. 170.

In the opinion of a majority of the court, the ruling of the judge, that the plaintiff was not entitled to recover, was, for these reasons, erroneous.

Exceptions sustained.

MILLER *v.* ROYAL FLINT GLASS WORKS ET AL.

172 Pa. St. 70: 33 At. 350. 1895.

MILLER entered judgment on the following note: "$826.00. West Bridgewater, Pa., May 7th, 1883. One day after date we promise to pay to the order of William Miller eight hundred and twenty-six dollars, without defalcation, value received. And further, we do hereby empower any attorney of any court of record within the United States or elsewhere to appear for us, and, after one or more declarations filed, confess judgment against us, as of any term, for the above sum with costs of suit and attorney's commission of — per cent for collection and release of all errors, and without stay of execution; and inquisition and extension upon any levy on real estate is hereby waived, and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived, and no benefit of exemption be claimed under and by virtue of any exemption law now in force, or which may be hereafter passed. Witness our hand and seal: Royal Flint Glass Works. [Seal.] J. Elsoffer, Treasurer. [Seal.] William McKibben, President."

The judgment was afterwards opened, and *Wagner* permitted to defend; but his defence was unsuccessful.

J. M. Buchanan and *Wm. A. McConnel*, for appellant.

T. M. Henry and *Jennings & Wasson*, for appellee.

MITCHELL, J. The duty of the prothonotary in entering a judgment by confession on a warrant of attorney, under the Act of February 24, 1806, is to enter it "against the person or persons who executed the same," but this does not restrict him to the name or names appearing in full on the face of the warrant. If it did, then a confession by a

partnership in the firm name only could never be entered up so as to be a valid lien against subsequent creditors. York Bank's Appeal, 36 Pa. St. 458. In Overton *v.* Tozer, 7 Watts, 331, the warrant was signed "T. C. Smart, Jr., & Co.," and was executed solely by Marshall, one of the partners; but the validity of the judgment was held to depend on the authority of Marshall to sign for the others.

The prothonotary, therefore, in entering the judgment, may inquire who are "the persons who executed the warrant," in the sense of who are the legal makers of the instrument liable thereon, even though they did not put their own hands to it, and their names do not appear on its face. In the present case the note was made in the firm name, which did not disclose the individual names of the partners. The plaintiff's attorney filed a formal declaration against the partnership by its title, and naming the individual members, and the judgment was confessed by him, and entered by the prothonotary in this form. There was nothing irregular on the face of it, and the court below was not bound to strike it off. The appellant having made affidavit that the note was made, and the judgment confessed, without his authority, the court opened it, to let in this defence. This was all that appellant was entitled to ask. At the trial the issue turned entirely on a question of fact, whether Elsoffer and McKibben had authority from the appellant, either at the time, or by subsequent ratification, to make the note. That appellant was a member of the firm, and was liable for the original debt to the plaintiff, was not disputed. In Fichthorn *v.* Boyer, 5 Watts, 159, it was held that if one partner sign and seal an instrument in the firm name, with the assent of the other, the latter is as much bound as if he had signed and sealed it himself, and his assent can be proved by "any of the usual modes of evidence." And this rule has never been departed from. Kramer *v.* Dinsmore, 152 Pa. St. 264. . . .

Judgment affirmed.[1]

[1] In Shain *v.* Du Jardin, 38 Pac. (Cal.) 529; (1894), the court said: "The contention that Rice & Co. was a fictitious name, and for that reason they could not maintain an action, needs no extended comment. A single individual or an association of individuals may do business under a firm name entirely distinct from the name or names of the person or persons composing such firm. In the absence of fraud, and as between himself and those with whom he deals, a person may do business and execute contracts under any name he chooses to assume. Bell *v.* Publishing Co., 42 N.Y. Super. Ct. 567; *Ex parte* Snook, 2 Hilt. 566; People *v.* Leong Quong, 60 Cal. 107. If the defendant purchased goods from the assignor of the plaintiff, who was doing business under the name of Rice & Co., he cannot, in the absence of fraud, evade payment by showing that Rice & Co. was not the true name of the party from whom he purchased."

DREYFUS ET AL. v. UNION NAT. BANK.

164 Ill. 83 : 45 N. E. 408. 1896.

THE firm of Morse, Mitchell, & Williams, composed of Francis E. Morse, George H. Mitchell, and Frederick C. Williams, was engaged in business in Chicago as dealer in clocks, jewelry, etc. On May 10, 1890, the three persons composing said firm, jointly with two other persons, Mortimer M. Burchard and Edward F. Cragin, purchased from one Anna B. Austin a certain tract of land in Cook County for the consideration of $120,000. Of this amount $35,000 was paid in cash, and the balance, $85,000, by notes, dated June 10, 1890, running over a series of years, and secured by trust deed on the property. For convenience, the title was taken in the name of Morse, and he executed the trust deed securing the notes. The purchase-money notes were each signed by all who were interested in the purchase, Morse, Mitchell, and Williams each signing his individual name. The firm name was not signed. Cragin subsequently sold his interest in the land to one Marshall, who in turn sold it to the firm of Morse, Mitchell, & Williams. All of said notes were paid, excepting two of them, — one for $20,000, and the other for $10,000, payable, respectively, three and four years after date. These had been discounted with the Union National Bank of Chicago.

On July 31, 1893, the firm of Morse, Mitchell, & Williams made an assignment to Elbert H. Gary for the benefit of their creditors. The Union National Bank filed a claim with the assignee, based on the two notes which it held. To this claim the assignee, and also Henry Dreyfus & Co. and R. A. Kipling, creditors of the insolvent firm, filed objections. Upon a trial of the objections in the county court of Cook County, several propositions of law presenting the claimant's theory of the case were submitted; but the court refused to hold any of them, and refused to allow the claim as against the partnership assets, holding that the notes represented an individual and not a firm indebtedness. From that order the claimant appealed to the Appellate Court, where the judgment below was reversed, and the cause remanded, with directions to allow the claim against the estate of the insolvent firm. To reverse the judgment of the Appellate Court the objectors prosecuted this writ of error.

Moses, Pam, & Kennedy, for plaintiffs in error.

Tenne, McConnell, & Coffeen, for defendant in error.

BAKER, J. The question in this case is whether or not the notes filed by the defendant in error as a claim against the insolvent estate of the firm of Morse, Mitchell, & Williams are a partnership indebtedness. The defendant in error insists that the plaintiffs in error, who are objecting to the allowance of said claim against the partnership assets, are not in a position to object to its allowance. This point is

not well made. That they are in a position to make the objection is clear, for one of them is the assignee of Morse, Mitchell, & Williams, while the others are creditors who have proved their claims against the insolvent estate, and their interest therein is such as to entitle them to protect it against improper claims. . . .

It is contended in behalf of the plaintiffs in error, that the notes on which the defendant in error bases its claim represent the individual indebtedness of the several persons whose names are signed thereto, and are not a proper charge against the partnership assets. Besides the signatures of Burchard and Cragin, the notes bear the individual signatures of Morse, Mitchell, and Williams, but not the firm name. The fact that they are so signed is not, however, necessarily conclusive that the obligation, in so far as Morse, Mitchell, and Williams are concerned, is not a firm obligation. Treating the notes as a firm obligation would not be inconsistent with their face. To determine the fact whether or not they are such, it is necessary to inquire into the nature of the transaction out of which they grew, and how it was intended they should operate. At the hearing, Francis E. Morse, one of the members of the firm, and Carrie A. Howard, the book-keeper, were called as witnesses in behalf of the defendant in error, and they were the only witnesses examined. Morse testified that the purchase of the Austin property was entered into by the firm as a partnership venture, and not on the individual account of the three members of the firm, and that the notes in controversy were given in partial payment of the purchase price; also that prior to the purchase of said property, the firm of Morse, Mitchell, & Williams had speculated several times in real estate. Both witnesses testified, and the firm's books show, that all of the money which was paid for the property, and all that was expended in improvements, was paid by the firm from its partnership funds; Burchard and Cragin refunding their proportions. The land and its proceeds were carried on the firm's books as partnership assets, and the purchase-money notes as partnership debts. This evidence was sufficient to make out a *prima facie* case for the defendant in error, for it shows that the purchase was made by the firm for partnership profit, and that the notes were given for a partnership indebtedness. And the evidence does not vary or contradict the terms of the notes, for they do not appear on their face not to be an obligation of the firm.

The fact that Mitchell's name did not appear in the preliminary agreement for the purchase of the property is of no importance, because it does appear in all the subsequent papers relating thereto. The important fact is, not who first contemplated making the purchase, but whether the firm of Morse, Mitchell, & Williams was one of the purchasers. It is also immaterial that the notes were signed with the individual names of the persons composing the firm, instead of being signed with the firm name, since they were given for a partnership indebtedness. Farwell *v.* Huston, 151 Ill. 239. The notes in question

were a proper charge against the assets in the hands of the assignee of Morse, Mitchell, & Williams, and its claim should have been allowed. The judgment of the Appellate Court is accordingly affirmed.

Affirmed.

YORKSHIRE BANKING CO. *v.* BEATSON ET AL.

5 C. P. D. 109: 42 L. T. N. S. 455. 1880.

Thesiger, L. J., read the judgment of the court. This is an action brought upon two bills of exchange of which the plaintiffs are the holders. The first is a bill for £276 15*s.*, dated 6th March, 1878, drawn by R. K. Kelly & Co. upon and accepted by Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the indorsements "R. K. Kelly & Co.," "Wm. Beatson," and "Josiah Carr & Sons." The second is a bill for £484 13*s.*, dated 13th March, 1878, drawn by Josiah Carr & Son, addressed "Mr. Wm. Beatson, chemical works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date, and indorsed by them; both bills were discounted by the plaintiffs upon the 14th March, 1878. The defendants to the action are Wm. Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant William Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills.

The circumstances of the case are as follows: Beatson for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873, and the beginning of the year 1874, the plaintiffs made inquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for discount with Beatson's name upon it; and the result of the inquiries being satisfactory, they discounted such paper. Beatson and Carr had some trade transactions together, but, apart from these trade transactions, there was a series of accommodation transactions carried out by accommodation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these accommodation bills were from time to time renewed. Down to the end of the year 1877 Beatson had no partner; but upon the 11th December, in that year, a deed of partnership was entered into between him and the defendant Mycock. By its terms the partnership was to last for a period of five years, with power of continuance. The value of the good will of the business, the works and premises where the same was carried on, and the machinery, plant, and effects belonging to it, was estimated at £25,000, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of £5,000. The business was to be carried on under the style of "William Beatson." The works and

premises were to remain vested in Beatson, who was to stand possessed of them for the purposes of the partnership, and the business was to be managed by Beatson, his partner not being required to attend to the business any further than he should think fit. By the 11th clause of the deed it was provided that "neither of the partners, without the written consent of the other first obtained, should, on the credit of the firm, make any payment, advance, or other application of the moneys or effects of the said partnership, or in any manner engage or use the same, or the name or credit of the partnership firm, except on account of and for the benefit of the partnership, and in the usual manner of carrying on the business;" and by the 12th clause it was provided "that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety, or security with or for any person whomsoever, nor make, give, draw, accept, or indorse any bond, bill, promissory note, or other instrument, or enter into any obligation or engagement, or make any default whereby the estate and effects of the partnership might be made liable for the payment or satisfaction of any sum of money for which the partnership should not have received a full and sufficient consideration." The object with which Mycock entered into this partnership was that of ultimately putting his son, who was then under age, into it, and, as a matter of fact, Mycock never interfered in any way with the management of the business, or occupied any other position in connection with it than that of a dormant partner. Beatson concealed from him any information relating to his accommodation transactions, and for his fraud upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until after July, 1878, at which date Beatson was a bankrupt. For some time prior to the formation of the partnership Beatson had kept an account at the Sheffield and Rotherham Bank, headed "William Beatson," and after the formation of the partnership that account was continued without any change in its heading, and into this account Beatson paid all moneys, whether moneys belonging to the partnership or his own private moneys; and upon it he drew, whether for the purposes of the business or his own private purposes.

Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned, gave evidence to the effect that he kept two cash-books, of which one was, as he stated, a private book, kept by him as manager at the place of business, the other a partnership cash-book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally, he stated that none of these were brought into the ledger, either before the partnership or after; that the cash transactions relating to these accommodation bills were entered in the pri-

vate cash-book, to which Mycock had no access, and were never put into the partnership cash-book, to which Mycock himself might have had access. With reference to his particular transactions with Josiah Carr, he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on, they were bills drawn for his and Carr's accommodation, not for Mycock's, although he added that they were in a degree for the business, as one way of finding capital, and that without the bill transactions there was not capital enough to work the business. He admitted that Mycock found the £5,000 which he was to pay for his share in the business; that he never told Mycock that money was wanted; that he thought he was not making Mycock liable for any of the accommodation bills, whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership book. He further said that he considered the bank-book private, and that Mycock had left him to keep the banking account as he thought proper; that the proceeds of accommodation bills were paid into the banking account, and that out of such proceeds the price of goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account; but that upon the same day as this occurred Beatson drew out more than he paid in.

On the part of Mycock an accountant was called who, upon an examination of Beatson's books, proved that apart from the accommodation bill transactions, the business had during the period between the beginning of January and the end of May, 1878, a cash balance to its credit; that the net result of the accommodation transactions was to reduce the balance; and that Beatson had drawn out for his own purposes, independent of the business, about £4,000. Upon these facts taken from the notes of LINDLEY, J., before whom with a jury the case was tried, that learned judge stated to the jury, as appears from the shorthand writer's notes, that the questions for them were: First, "was the name Wm. Beatson put to the bills to denote the firm or to denote Wm. Beatson?" Secondly, "Did the bank take the bills as the bills of the chemical works, whoever the proprietors might be, or as the bills of Wm. Beatson only?"

The jury retired, and upon returning into court, the foreman stated that as regards the bill for £484 13*s.*, it having been drawn upon William Beatson at the chemical works, Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm; but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned judge to answer the question as regards that bill according to their judgment, the jury conferred again, and subsequently stated that, from the fact of that bill being put in connection with the other, they might take it as being the same thing; and to the second question they answered that the bank took the bills as the bills of the chemical works. Upon these

findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock.

That judgment was subsequently set aside and judgment entered for Mycock by the Common Pleas Division, upon the ground, stated shortly, that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual and not of the firm; that consequently it lay upon the plaintiffs in this case to displace that presumption by showing that the signatures to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorized to use the firm name on the particular occasions and for the particular purposes; in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them. 40 L. T. Rep. N. S. 658; L. Rep. 4 C. P. Div. 212. Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs either, first, that where, as in this case, a signature is common to an individual and the firm of which the individual is a member, it is open to the *bona fide* holder for value without notice, whose paper it is, of a bill with such a signature upon it, to sue either the individual or the firm; or, secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least where the individual carries on no business separate from the business of the firm of which he is a member. As regards the first of these two contentions, we think that it is not a well-founded one.

The only authoritative sanction to it upon which the learned counsel for the plaintiffs rely is in a case of McNair *v.* Fleming, which appears to have been decided in the House of Lords in 1812, but which is not reported otherwise than in Montague on Partnership, vol. I. p. 37, and in the opinion of Lord Eldon delivered to the House of Lords in the case of Davidson *v.* Robertson, 3 Dow. 229, and which, without further knowledge of the facts of the case, and the exact bearing of the judgment upon them, it is impossible to treat as an authority. Lord Eldon does not quote it in support of so wide a proposition as that under consideration, but as bearing upon the proposition that a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other, a proposition which had been negatived by one of the interlocutors of the Scotch court, finding that whatever might be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other. While, therefore, there is really no authoritative sanction for this contention, there is abundance of authority against it in the numerous cases in the English and American courts, where the liability of partners upon a bill signed in a name common to the firm, and an individual member of it, has come under consideration, and has been discussed, not upon the footing of any

right of election on the part of the holder of the bill, but upon the particular circumstances of each case, and the presumptions applicable to them, cases which we shall have to refer to in connection with the plaintiffs' second contention.

Apart, too, from authority it appears to us manifestly contrary to true principles of law that the holder of a bill, bearing upon it a name which *prima facie* indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm, although at the same time that the proof is given it is proved also that the bill was signed by the individual for himself and not for his firm, and for consideration entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight, and apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that if the contention be correct, it at least displaces the ground upon which the judgment of the court below rests, although it will still remain to be considered whether the judgment may not be rested upon another ground. As a matter of principle there is considerable force in the arguments both for and against the contention. Against it, it is said that where a signature to a bill is of a name which in itself and *prima facie* indicates an individual, and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving, not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but further, that the bill was signed by the individual as a partnership act and for partnership objects. In support of the contention it is said that, inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm, in a case where it is proved or admitted that there is no trading in the name except by the firm.

In the absence of authority upon this question our opinion upon it would be in favor of the plaintiffs' contention. In point of convenience and expediency, and in the interest of trade, it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of a partnership; and if they were compelled to go further, and prove that the particular bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones too, might escape from just liabilities. On the other hand, the partners

sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued upon was or was not a partnership bill, and should, as it appears to us, at least have the onus of doing so thrown upon them, when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise.

But in the court below it was considered that the American authorities clearly negatived this view, and that the weight of English authority is in favor of the American view of the law. We propose then to consider first the English authorities. In Swan *v.* Steele, 7 East, 209, two persons of the name of Wood and Payne were wholesale grocers in Liverpool, trading under the firm name of Wood & Payne, and also carrying on, under the same firm name, and at their counting-house, the business of buying and selling cotton. The defendant Steele was a dormant partner with them in this latter business. It was held that he was liable upon an indorsement in the firm name of a bill which had been paid to Wood & Payne, for cotton sold by the firm, but which had been delivered by them to provide for an acceptance in the firm name for sugar supplied to the grocery business. It is difficult to see how the case could have been otherwise decided, for the bill sued upon was admittedly a bill in which Steele was interested as indorser and holder with his partner, and consequently the indorsement over of that bill, although improper under the circumstances, was still manifestly an indorsement in fact by the partnership of which Steele was a member. The evidence showed what the facts were, and the judgment of Lord Ellenborough assumed that the indorsement was in the name of the partnership of which Steele was a member, and upon that assumption decided that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. Emly *v.* Lye, 15 East, 6, which is commented on in the judgment of the court below as an authority in favor of the defendant upon the point under consideration, has really no bearing upon it. There, in an action upon several bills of exchange, and for money had and received, it was attempted to make the defendant liable, either upon the bills or in respect of the money received upon the discount of the bills, which was applied to partnership purposes, where the signature upon the bills was not in the firm name, which was George Lye & Son, but in the name of E. L. Lye, which was the individual name of the partner signing. The counts upon the bills were upon the argument abandoned, as it was obvious, as Lord Ellenborough said in his judgment, that "on a bill of exchange drawn by one only it cannot be allowed to supply by intendment the names of others in order to charge them;" and it was held that on the mere discount of the bill no right could arise against the defendant by reason of the proceeds being used for partnership purposes, in other words that the transaction was nothing more than a purchase of the bills from the signing partner.

The case of *Ex parte* Bolitho, 1 Buck. 100, is claimed as an authority

for the defendant. There Peter Blackburn was a secret partner in a business carried on by Isaac Blackburn in his own name, and was sought to be made liable as drawer in respect of bills drawn in the name of Isaac Blackburn, by Isaac himself. Upon the affidavits it appeared that Peter Blackburn also carried on a separate business, and that after Isaac Blackburn had drawn and indorsed the bills Peter Blackburn indorsed them also with his own name for the purpose of getting them discounted. The Lord Chancellor stated that it was impossible for him upon the affidavits to decide between the parties, and that this case must be sent to a court of law for its deliberation, and he directed an issue whether the two Blackburns were jointly liable upon all or any of the bills. In the course of his judgment, however, he said: "If the money is advanced to A. and B., and the lender takes a bill from one of them only, he cannot maintain an action upon the bill against the two. Now if A. and B. are partners and also separate traders, and A. draws a bill and indorses it in his own name, and B. also indorses it, and they become bankrupts, what is there to prevent a holder of a bill from proving against the separate estate of each of them? And unless you can show that when A. drew the bill he drew it not as A. but as A. and B., there can be no legal contract upon the bill as against the two." In these remarks of Lord Eldon, the introduction of the element of separate trading by A. and B., and of the further element of both A. and B. putting their names to the bills, so differs Lord Eldon's supposed case from the case we are considering of a bill signed in a name common to a firm, and an individual member of the firm, where there is no trading separate from the trading of the firm, and no signature to the bill but that of the common name, that *Ex parte* Bolitho appears to us rather to support the contention of the plaintiffs' counsel than to assist the defendant Mycock. The case of the Bank of South Carolina *v.* Case, 8 B. & C. 427, was one in which three persons carried on business in partnership in England under the firm name of Crowder, Clough, & Co. One of the partners — J. B. Clough — was sent out to America to form a branch house, which he did form, under his own individual name. He was restricted under the partnership articles from transacting any business in America except on the partnership account; and as a matter of fact, as appears from the report, p. 432, he had no individual business, and the name of J. B. Clough was never used by him in trade, or in drawing, indorsing, or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership. Under the circumstances it was held that all the partners were liable as indorsers in respect of certain bills indorsed by Clough in the name of J. B. Clough, and which were connected with partnership transactions, although Clough in indorsing them disregarded certain specific instructions given him by his partners, and exceeded his authority. It is not necessary to discuss whether the doubts raised by Crompton, J., in Nicholson *v.* Ricketts, 2 E. & E. 497, as to the correctness of this decision are or are not well founded.

It is sufficient for our present purpose to say that the decision proceeded upon all the facts of the case, and not upon any doctrine as to presumption or burden of proof.

But the case of Furze *v.* Sharwood, 2 Q. B. 388, is a distinct authority upon the point under consideration. There a business was carried on by trustees for creditors in the name of Samuel Maine, one of the persons who had previously carried it on in partnership. Maine had also for a time a separate business of his own. The plaintiff had discounted for the old partnership, and also had been accustomed to lend Maine money for the purposes of his private business. Maine after a time sold his separate business and ceased to carry it on, and, having subsequently indorsed bills in the name of "Samuel Maine," one of which had been discounted by the plaintiff, and was sued on, and the proceeds of which were placed to his credit at his bankers, and were drawn upon indiscriminately for the purposes of the business to which he was agent, and for his own private purposes, the trustees were held liable, as indorsers, and Lord Denman, C. J., in delivering the judgment of the court, said: "*Prima facie*, therefore, the signature Samuel Maine was their signature, and they would be bound by it. But it is said that Maine carried on a separate business of his own, and that the plaintiff was bound to show that the indorsements in question were on account of the business of the trustees, and not on account of his separate business. Now it appears that the bills were discounted with persons who were in the habit of discounting for the former firm who assigned their effects to the defendants as trustees, and, moreover, that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances we think that the onus of showing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case. We are therefore of opinion that the defendants were bound by the indorsement of Maine, and that the plaintiff on this ground of objection would be entitled to our judgment." 2 Q. B. at p. 418.

This decision is in no way shaken by that in Nicholson *v.* Ricketts, 2 E. & E. 497, where two firms with distinct trade names agreed to carry on joint exchange operations under such circumstances as to make them partners in them; and it was held that the signature to bills of one of the two firms drawn in course of the exchange operations did not make both firms liable as drawers; for the decision proceeded simply on the ground that by the arrangements between the two firms the names or the two firms were to be used separately, the paper to be dealt in being drawn by one firm and accepted by the other, and as Cockburn, C. J., said, at p. 523, it did not appear that the drawing firm had any authority, express or implied, to bind the defendant by drawing bills. The

case of *Re* Adansonia Fibre Co.; Miles' Claim, L. Rep. 9 Ch. 635, was substantially the same as that of Nicholson *v.* Ricketts, and was decided upon the same considerations. In each of these cases the court came to the conclusion, as a matter of fact upon all the circumstances before it, that the name on the bill was not intended to be, and was not, the name of the partnership sought to be made liable upon it.

Upon this view of the English authorities, they appear to support the view that where a name is common to a firm and to an individual member of such firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed in the common name is a bill drawn, accepted, or indorsed for the partnership, and for which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the *prima facie* case made against them.

But as the court below relies much upon the American authorities as uniformly negativing this view, and those authorities have been much discussed in the argument before this court, we think it desirable to refer to them. The authorities specially cited in the judgment of the court below are Parsons on Bills of Exchange, 531; Story on Partnership, 106, 142; the decision in the Supreme Court of New York of Oliphant *v.* Mathews, 16 Barb. 608, and the direction of Story, J., to the jury in United States Bank *v.* Binney, 5 Mason, 176, 185. The passage referred to in Parsons does not bear out the proposition for which it is cited. He says: "The burden of proof is upon the plaintiff to show that the paper was given in the business, and for the use of the firm, for it will be intended *prima facie* to have been given in the separate business of the partner signing it, and to be binding on him alone, at least if he is also engaged in business on his own separate account." The views of Story, J., are best taken from his ruling in United States Bank *v.* Binney, where, in directing the jury, he used this language: "In the present case the signature of John Winship may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof is upon the plaintiffs to establish that it is a contract of the firm, and ought to bind them." But there was evidence to go to the jury in that case that the partnership was limited to a soap and candle business, and that the accommodation notes which were sued on were given in respect of consignments of meat, which might have constituted, and, it was contended, did constitute the separate business of Winship. It is doubtful therefore whether Story, J., intended his proposition to extend to a case where no separate business could even be suggested as existing.

On the other hand, in the case of Mifflin *v.* Smith, 17 Serg. & Rawle, 165, Rogers, J., dealt with the doctrine of presumption in a case where the question was whether the loan of money obtained by a member of a partnership carried on in his individual name was obtained on the faith of the partnership business, or on the credit of the individual partner,

and he laid it down that the presumption was that it was made on the faith and credit of the business, saying: "If a retail merchant gets a note discounted, is it not to be presumed to be in the regular prosecution of his business?" and adding: "The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable, however, to be rebutted, if the jury believe from the evidence that was not the state of the fact." A motion to the Supreme Court of Pennsylvania, founded, amongst other things, upon the alleged error of this direction, was refused. This case was decided in 1827. The case before Story, J., was in 1828.

In 1845 the question under consideration again arose in the Supreme Court of New York in the case of Bank of Rochester *v.* Monteith, 1 Den. 402, where the name of Wm. Monteith, an agent of the firm, had been used as the firm name, and the court said: "If Wm. Monteith had also been in business on his own account, then the acceptance by writing his name on the face of the bills would have been an equivocal act, and it would have been necessary to show that he accepted on account of the partnership, and not in his own private business," and after citing among the authorities for this proposition the United States Bank *v.* Binney, thus indicating that they must have thought that in this case there was a separate business carried on by the individual whose name was used, the court added: "But there was no evidence that Wm. Monteith was engaged in any other business than the affairs of this partnership. We must then regard those bills as drawn and accepted by the house doing business in the name of Wm. Monteith."

In 1853 was decided, also in the Supreme Court of New York, the case of Oliphant *v.* Mathews, which is the second of the two cases cited in the judgment of the court below. That case, when critically examined, will be found not to be inconsistent with the cases of Mifflin *v.* Smith and Bank of Rochester *v.* Monteith. It is true that the court laid down in general terms that where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners. The court immediately qualified the generality of the proposition laid down by saying that the presumption might be repelled and overcome (in other words the onus of proof might be shifted) by proof as to the business in which such person was engaged; and while citing Mifflin *v.* Smith as explaining what proof would be sufficient, the court pointed out that in the case before them it was proved that the individual did business and borrowed money on his own account, as well as on account of the partnership; and it was not shown that one was not as constant and regular as the other. This case, therefore, is in no way inconsistent with the previous case decided in the same court of Bank of Rochester *v.* Monteith, and none of the other cases cited in the argument before us carries the doctrine of presumption in favor of the defendant further.

It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the court below, and are in favor of the second contention urged in this case on behalf of the plaintiffs. Applying then the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus: The only business carried on in the year 1878 in the name of and by Wm. Beatson was the business of the partnership, and both the bills sued upon have the appearance of trade bills. *Prima facie*, then, the bills were bills indorsed and accepted respectively in the name and on account of the partnership, and if that *prima facie* case were not displaced, Mycock would be liable upon them to the plaintiffs as *bona fide* holders for value without notice, even though they were so indorsed and accepted for the private purposes of Beatson, and in fraud of his partner. The nature of the partnership business was such as to give Beatson in respect to persons dealing with him in business an implied authority to bind his partnership by bills of exchange, and his partner, although a secret one, must be held responsible upon any bill signed by Beatson in the name of the firm in favor of a holder whose title cannot be impeached, however much Beatson in signing that name may have exceeded the authority and broken the trust reposed in him by the agreement of partnership. As was said by the court in giving judgment in the case of Wintle *v.* Crowther, 1 C. & J. 316: "Where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached," and the authorities generally, both English and American, are uniform in support of this view.

There is no difference in this respect between the dormant and the ostensible partner, and when once it is established that a name common to a firm and an individual member of it has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in such a name, and the liability of partners carrying on business in a name which bears in itself the stamp and evidence of a partnership. It may perhaps be argued that in the latter case the *bona fide* holder without notice is induced by the name itself to trust a firm, and is therefore entitled to have all the responsibility of all the members of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is; but when it is remembered that firm names are often used by individual traders, while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases remains alone consistent with mercantile expediency and general law.

But assuming that there is no difference, as matter of law, between the two cases, there is as matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances, of which the case of Stephens *v.* Reynolds, 5 H.

& N. 513, is an example, leave open any doubt as to the meaning of a signature in such name; but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few, if any, cases where the decision of the jury or of a court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favor of the plaintiffs arising from the fact that Beatson carried on no business separate from that of the partnership really sinks into comparative insignificance by the side of the additional facts which are proved in the case.

Upon those facts we have to decide, as the courts in Nicholson *v.* Ricketts and *Re* Adansonia Fibre Co., Miles' Claim, were called upon to decide, whether the signature to the bills upon which the dispute arises was intended to denote and did denote the partnership of which the defendant was a member. In the first place it is clear that the bills were bills, which, if signed by Beatson for the partnership, were so signed by him without the authority and in fraud of his partner, and in respect of which no action would have lain against Mycock, if they had remained in the hands of Josiah Carr & Son, who took them with notice. In the second place, it is, we think, equally clear that as between Beatson and Mycock the bills were not treated as having been signed by Beatson on the partnership account. They were not entered in any partnership book, and indeed, even before the partnership as well as after it commenced, the accommodation transactions of Beatson were treated as not forming any part of the transactions of his business, and were excluded from the ledger. In the third place, the evidence establishes that the accommodation transactions of Beatson after the commencement of the partnership diminished rather than added anything, even temporarily, to the capital of the firm; and, lastly, Beatson himself, called as a witness by the plaintiffs themselves, disproved, as it appears to us, the fact that in signing the bills in question he signed for the partnership. He stated that he thought he was not making Mycock liable for any of the accommodation bills, whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership books. Can any other inference be reasonably drawn from such evidence than that Beatson, in signing the bills, intended to sign and did sign them for himself? We think that no other inference ought to be drawn, and that the jury, in finding that "William Beatson" upon each of the bills was intended to denote the firm, gave a verdict against the evidence, and one which ought not to stand.

The reason given in support of their finding by the jury that one bill was addressed to the drawee or drawees as of the Chemical Works, Rotherham, and that the other was so connected with it as to stand or fall with it, might have been a good reason in a case where the evidence was in other respects doubtful, but it is in the present case met to some extent by the very form of the bill itself, which, while addressed to the

drawee or drawees at the partnership works, contains in the term "Mr." prefixed to the name "Wm. Beatson" an indication that the individual and not the firm was intended, and is entirely outweighed by the clear evidence to which we have referred, and we understand that the learned judge who tried the case was himself dissatisfied with the finding. The additional finding that the bank took the bills as the bills of the chemical works is clearly irrelevant if the former finding is wrong, for if the bills were in fact signed not in the name of the partnership, but of Wm. Beatson individually and for his private purposes, the fact that the plaintiffs were unaware that Mycock was a partner with Beatson, and never advanced any money on the faith of his credit, but did at the same time give credit to the name of Beatson as being the name of the owner of the chemical works, can give them no more right against Mycock than if he had been a mortgagee of the works instead of a partner in them.

The law in a case of bankruptcy asserts a title in the general body of creditors of a bankrupt to property of which he may have been at the time of his bankruptcy in apparent possession with the consent of the true owner, and upon the faith of which he gained a false credit. But in actions founded upon purely personal contracts, the law does not use the mere moral right which a creditor may attempt to assert against a person in consequence of his having intrusted to another property in the belief of his ownership, of which the creditor may have contracted with him. In other words, in a case like the present there is no conduct on the part of the dormant partner which makes it inequitable on his part to deny, or estops him from denying, his liability upon a contract to which he was in fact no party, from which he has derived no benefit, and in respect of which he was not held out to the person suing him as liable. As regards this point, nothing turns on the subject matter of the action being negotiable instruments. Beatson, by giving the use of his name to a partnership of which he was a member, and the only ostensible member, did not preclude himself from making contracts binding himself alone, and in any contracts *de facto* made by him, whether by parol or in writing, the question, the answer to which would determine Mycock's liability or freedom from liability, would not be whether the other contracting party trusted Beatson because he supposed him to be sole owner of the chemical works, but whether Beatson, whom alone he knew and actually trusted, was acting as agent for the partnership, or in his individual capacity for himself. This kind of question was raised in the case of the Bank of Scotland *v.* Watson, 1 Dow. 40, where the bank and its agents carried on separate banking business at the same office, and the bank was unsuccessfully sued by a person who relied in support of his claim against the bank upon a receipt which bore the address of the common office.[1] We think that the judgment of the court below should stand, and that this appeal should consequently be dismissed. *Judgment affirmed.*

[1] A paragraph, relating to a question of practice, has been omitted.

BUSH, NEXT FRIEND OF WEIR, *v.* LINTHICUM.

59 Md. 344. 1882.

LINTHICUM filed his bill for a dissolution of the partnership between himself and Weir, and for other relief. Weir, by his next friend Bush, interposed the defence of infancy. The decision of the trial court was in favor of the complainant, and the defendant appealed. The opinion of the trial court was approved by the Court of Appeals, and its order affirmed.

F. H. Stockett, Jr., and *F. H. Stockett*, for the appellant.

John Ireland and *James Revell*, for the appellee.[1]

MILLER, J. . . . On the part of the defendant, it is strenuously insisted that this plea of infancy is a flat and absolute bar to all the relief asked by the complainant in his bill, and that the same must be dismissed with costs, and the proceedings ended.

To this proposition thus broadly stated and insisted upon, I cannot yield assent. I concede that the law casts its protection and guardianship around infants, as to all their contracts except those for necessaries, and that it is not competent for the court in this case to pass any decree which will impose any personal liability upon the infant defendant for the debts of this firm, or enforce upon him any of the terms or conditions of this partnership contract, or even compel him to pay any of the costs of these proceedings. So far I agree that his infancy protects him, but I am clearly of opinion that it is perfectly competent for the court to decree a dissolution of the partnership, and to wind up its affairs through the medium of a receiver — that is, to collect the debts due the firm, sell its assets, and apply the same to the payment of its debts. In doing this no wrong is done to the infant, no executory contract is enforced against him, and he is thereby merely restrained from using his infancy as a means of doing injustice to, or, perhaps, perpetrating a fraud upon, his co-partner. If the court has not the power to grant relief to this extent, then the adult will, in every case, be placed at the mercy of an infant partner. All the books upon partnership lay down the proposition that an infant may become a partner with an adult. It is a contract not absolutely void, but one which the infant may stand to or repudiate, at his election. While he remains a partner he has the rights and powers of a partner. He has equal right with his co-partner to the possession of the assets of the firm, to collect the debts due it, and he has also the power to contract debts in the name of the firm, which, though he may himself subsequently repudiate, and get rid of personal responsibility therefor, are still binding upon his co-partner. Take the case of an adult who has unfortunately entered into a partnership with an infant, who misrepresented himself at the time to be of full age. After a short time, both become dissatisfied, mutual confidence is destroyed, and

[1] The statement has been abridged.

each becomes odious to the other. The infant then knowing the security from responsibility which his infancy affords him, and at the same time availing himself of his powers as a partner, and seeking to defraud and injure his co-partner, proceeds to get possession of the partnership assets, to sell them, and to put the proceeds in his pocket, and goes on contracting debts which he knows he is not responsible for, but which he also knows will work the absolute bankruptcy of his co-partner. Is it possible that a court of equity has no power, at the instance of the adult partner, to lay its hands upon such a concern, stay the consummation of his ruin, and release the tie which binds him to the body of such a death? In my opinion there is no such lack of remedial power in courts of equity, and infancy cannot be availed of as a bar to such relief. If authority be needed in support of this position, it seems to me that it is abundantly sustained by the decision of the chancellor in the case of Kitchen *v.* Lee, 11 Paige, 107.

It is thereupon adjudged and ordered that the plea of infancy filed in this case by the defendant be and the same is hereby overruled and rejected in so far as it is sought to be used as a bar to so much of the relief prayed by the bill as asks for a dissolution of the partnership, the granting of the injunction prayed for, and the appointment of a receiver to take charge of and wind up the affairs of the firm by collecting the debts due to it, by taking possession of and selling its assets, and by applying the same to the payment of its debts.[1]

LOVELL & CHRISTMAS *v.* BEAUCHAMP.

[1894] Appeal Cases, 607.

THE respondent was a partner in the firm of Beauchamp Brothers. Appellants brought an action against the firm for goods sold. Respondent, an infant, appeared by his guardian *ad litem* and objected that he was not liable. Judgment was ordered against the defendants, but execution was not to issue against the respondent's separate property or against his share in the partnership profits. Appellants, as judgment creditors, presented a petition in bankruptcy, and obtained a receiving order against the estate of Beauchamp Brothers. This order was rescinded by the Court of Appeal, upon the ground that, one of the

[1] In affirming the foregoing opinion, the Court of Appeals declared: "Having formed this partnership, he cannot so far repudiate it during minority as to escape such consequences of partnership as do not involve personal liability for claims against the firm, or costs incident to the legal settlement of its affairs. Such partnership must be dissolvable as any other: and the partnership assets must be assignable to partnership creditors. What his rights may be, as against his adult co-partner, when he reaches his majority, we do not decide."

partners of Beauchamp Brothers being an infant, it could not properly be made against the firm. *In re* Beauchamp Brothers, [1894] 1 Q. B. 1.[1]

Cooper Willis, Q. C., and *Finlay, Q. C.*, for the appellants.

Sir Henry James, Q. C., and *Arthur Powell*, for the respondent.

LORD HERSCHELL, L. C. My Lords, I do not think there can be any doubt as to the substantial rights of the parties in this case. The form which the proceedings have taken gives rise to greater difficulty.

My Lords, I proceed now to state what I conceive to be the true position of the parties. I think it is clear that there is nothing to prevent an infant trading, or becoming partner with a trader, and that until this contract of partnership be disaffirmed, he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm, he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors.

It is also clear that even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankrupt laws in respect of any debt contracted by the firm of which he is a partner.

The plaintiffs were, no doubt, entitled to issue a writ against the firm in the firm's name. But it is to be observed that the order (XLVIII. A), which sanctions such a proceeding, provides (rule 5) "that persons sued as partners in the name of their firm shall appear, individually, in their own names." As soon as it appeared that a member of the firm was an infant, I do not think that it was proper to sign judgment against the firm.

The Divisional Court appear to have taken the view that, inasmuch as one of the partners was an infant, the firm might be treated for the purposes of the action as consisting only of the other partner, but I do not think this is so. Although an infant, he was a partner, and the firm name, Beauchamp Brothers, applied as much to him as to an adult partner. The Court of Appeal took the view that the judgment against the firm was good and might be made available against the partnership property, though it would be ineffectual as against the infant partner. I have a difficulty in seeing how it can be supported. Although the judgment may be pronounced against the firm in the firm's name, it is in reality a judgment against all the persons who are in fact members of the firm; and it is because such a judgment exists that the right of

[1] "The case has been argued as though a firm had a separate existence as distinguished from the individual members; as if it were a corporation. . . . It is no such thing, and the rules do not mean anything of the kind." Kay, L. J., at p. 7.

execution follows. It cannot be regarded as a judgment merely against the assets of the firm. The right of execution, whatever it may be, arises from the fact that certain persons have been adjudged debtors. I have already said that in my opinion the infant could not be so adjudged.

It is true that rule 8 of Order XLVIII. A, which sanctions, in the case of a judgment against a firm, execution against the property of the partnership, restricts any further execution except in specified cases without leave of the court or a judge. But I do not think this affords warrant for a judgment against a firm including a person who, though a member of the firm, was not a debtor. It appears to me, therefore, that the judgment should either have been against Ralph Beauchamp alone or against the firm, excepting Gilbert Walter Beauchamp. I shall have to say something further on this point presently.

If the judgment had been in either one or the other of these forms, a receiving order might no doubt have been obtained upon the petition of Lovell & Christmas against Ralph Beauchamp, and in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm. The respondent insists that the bankruptcy proceedings were properly set aside, inasmuch as the receiving order against the firm would operate under rule 262, as if it were a receiving order made against each of the persons who, at the date of the order, was a partner in the firm, and therefore as a receiving order against him.

I agree with the courts below in thinking that the receiving order in the form in which it was made by the registrar cannot stand. The question is, under those circumstances, what ought to be done? I am most unwilling, if it can be avoided, to deal with the receiving order in a manner which would liberate Ralph Beauchamp from its operation, and render fresh bankruptcy proceedings necessary. If the judgment and receiving order stand as against him, he will certainly suffer no injustice; whilst if the receiving order be set aside absolutely, and a fresh petition is thus rendered necessary, transactions, which might be avoided under the present receiving order in the interests of creditors, might become incapable of avoidance under a receiving order of a later date.

I see no difficulty in amending the judgment by adding after the word "defendants" the words "other than Gilbert Walter Beauchamp." There is, I think, nothing irregular in a judgment against a firm in the firm's name excluding one of the partners. It may be, in many cases, of advantage to the plaintiff to obtain such a judgment where he fails to establish the liability of a member of the firm, inasmuch as the judgment would bind not only the partners who have appeared, but also any dormant partners who have not appeared. This might be a reason for taking the judgment in that form rather than as a judgment against the known members of the firm who were liable for the debt.

Supposing the judgment thus amended, I think the bankruptcy proceeding may be amended in conformity therewith by adding throughout, after the words "Beauchamp Brothers," the words "other than Gilbert Walter Beauchamp."

The Bankruptcy Act gives ample powers of amendment. By sect. 105, the court may, at any time, "amend any written process or proceeding under this act on such terms, if any, as it may think fit to impose." Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute, as from its date, a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors.

I think there should be no costs on either side of these proceedings. If any have been paid, they should be repaid, or allowed in account as against costs due from the other party.

LORDS ASHBOURNE, McNAGHTEN, and WATSON concurred.

FOLK *v.* SCHAEFFER ET AL.

180 Pa. St. 613: 37 At. 104. 1897.

FELL, J. The plaintiff was injured while assisting his fellow workmen in placing a hood on the top of an iron smokestack. The direct cause of the accident was the slipping of a knot in one of the guy ropes which held a derrick in place. The knot had been tied by one of the defendants, — Merkel. The action was against Schaeffer, Merkel, and Betolette, co-partners trading as Schaeffer, Merkel, & Co. At the time of the accident the work was in charge of the plaintiff. None of the defendants were present, and none of them except Merkel had seen the appliances used, or had any connection with the work. At the trial an offer was made to prove by a witness that after the accident Schaeffer had said that the plaintiff ought to be paid; that he had always been willing to pay him; that the other members of the firm did not agree with him; and that he preferred to pay the plaintiff, rather than that the money should go to the lawyers who had brought the action. Under objection, this witness testified that two years after the accident Schaeffer had made to him a statement substantially the same as that set out in the offer. It does not appear that Schaeffer had any personal knowledge of the accident, or of the circumstances under which it happened. He made no admission of a fact from which negligence could be inferred, and no acknowledgment of a liability recognized by the firm. At the most, he but expressed his individual opinion that the plaintiff should be paid, and a willingness, on his part, not acquiesced in by his

partners, that the firm should pay something to avoid litigation. His opinion as to the legal liability of his firm, and his expression of a willingness to pay something in compromise of pending litigation, neither imposed a liability nor tended to establish facts from which it would arise. This testimony was doubtless prejudicial to the defendants, and the error in admitting it was not cured by limiting its effect to the party who made the statement. As the action was against the firm, there could practically be no such limitation. . . .

The judgment is reversed, with a venire facias de novo.

HYDE ET AL. v. MOXIE NERVE FOOD CO.

160 Mass. 559: 36 N. E. 585. 1894.

HOLMES, J. This is an action to recover for services rendered and expenses incurred by the plaintiffs as attorneys for the defendant. The case is here on the defendant's exceptions to the refusal of the judge below to make certain rulings requested by it. The defendant was not represented before us by professional counsel, and the argument on its behalf took a wide scope. But much as, under some circumstances, we might feel the force of the general considerations addressed to us, we are not at liberty to go beyond the questions of law raised by the requests, and we necessarily confine ourselves strictly to them.

The first ruling requested was as follows: "That if the evidence should prove that Henry D. Hyde, Marquis F. Dickinson, Jr., and Elmer P. Howe were not co-partners at the time the present action was brought, the plaintiffs cannot recover." This seems to be founded upon an imperfect analogy. It is said that a firm is a legal person, and that a dead person cannot sue. But a firm is not a person in the sense supposed. For technical purposes of suing, or being sued, the law does not know the firm, but only the men composing it. If we leave technicalities on one side, and consider practical convenience, it would not do at all to let dissolution — for instance, by the death of a member — prevent the collection of debts due to the firm. If authority is needed, the point is settled by decisions. Fish v. Gates, 133 Mass. 441; Page v. Wolcott, 15 Gray, 536. . . .

Exceptions overruled.[1]

[1] A part of the opinion, not bearing on partnership law, is omitted.

§ 2. Firm Title: How Taken and Held.

MAUGHAM *v.* SHARPE ET AL.

17 C. B. N. S. 443. 1864.

W. Dolby, in consideration of an advance of £650 to him by the defendants, doing business in the firm name of "The City Investment and Advance Co.," assigned to them in such firm name by deed all the goods, chattels, and effects upon his farm. Later, he gave a bill of sale of the same goods to plaintiff. Defendants took possession of the goods and sold them. Plaintiff brought this action against them. The first count was for conversion of the goods; the second, for money received by the defendants to plaintiff's use.

Plaintiff contended that as the deed under which defendants claimed purported to convey the property to "The City Investment and Advance Co.," and not to the defendants by name, the goods could not pass by such deed to the defendants.

Williams, J. . . . The first question is as to the validity of the deed whereby Dolby assigned the goods in question to "The City Investment and Advance Company." It has been objected on the part of the plaintiff that that conveyance is inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good, though the grantee be not named by his Christian or surname. In Sheppard's Touch Stone, p. 236, the learned author, after discussing the consequences of a mistake in the Christian name, or surname, of the grantee, goes on to say: "And yet, if the grant do not intend to describe the grantee by his own name, but by some other matter, then it may be good by a certain description of the person, without either surname or name of baptism;" for he adds: "*Id certum est quod certum reddi potest.*" In this case, I apprehend, the meaning of the grant is plain; the deed purports and intends to convey the goods to those persons who use the style and firm of "The City Investment and Advance Company." They may or may not be a corporation; but when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them. . . .

Willes, J., concurred.[1]

[1] The statement of facts has been condensed, and the opinion of Erle, C. J., as well as a part of Mr. Justice Williams' opinion dealing with another subject, has been omitted.

HENDREN ET AL. v. WING ET AL.

60 Ark. 561: 31 S. W. 149. 1895.

RIDDICK, J. The Arkansas Machinery & Supply Company is not a corporation, but it is a business name of a firm of partners. The question for us to determine is whether a chattel mortgage executed to it as such partnership is valid at law. . . . The decisions in regard to transfers of real estate to partnerships are based on the old rule, that "a partnership, as such, cannot at law be the grantee in a deed or hold real estate." Percifull v. Platt, 36 Ark. 464. This rule does not apply to personal property. On the contrary, a partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property. The custom of the country teaches us that this is so. The business of the country is largely carried on by partners under partnership names which frequently do not contain the name of any person. Vast quantities of personal property of all kinds are contracted for, bought, and sold by such firms under their firm names each year, and their right to thus buy and sell goes unchallenged. A consideration of this fact shows that there is a wide distinction between the rights of partnerships at law in regard to the buying and selling of personal property and the restrictions which prevail therein in regard to transfers of real estate.

A mortgage is only a conveyance for the purpose of securing a debt. If a bill of sale conveying personal property to a partnership by its firm name is valid, we see no reason why a mortgage of personal property to a partnership should not be upheld under like circumstances. It is true that the statute requires certain formalities in regard to acknowledging and recording mortgages in order to give notice to third parties. But there is nothing in the statute which renders invalid mortgages of personal property executed to a partnership by its firm name. Such a conveyance to a firm is just as effectual as if the name of each partner had been set out in the mortgage. Henderson v. Gates, 52 Ark. 373; Kellogg v. Olsen, 34 Minn. 103; Byam v. Bickford, 140 Mass. 32; Brunson v. Morgan, 76 Ala. 593; Lumber Co. v. Ashworth, 26 Kan. 212.

We therefore conclude that the judgment of the Circuit Court in regard to the validity of the mortgage was correct, and it is affirmed.

DELMONICO v. GUILLAUME ET AL.

2 Sand. Ch. 366. 1845.

PETER and John Delmonico became partners as restaurateurs in the city of New York, in October, 1827. In 1835, they purchased a farm in the eastern part of the city of Brooklyn, for the purpose of supply-

ing their establishment with vegetables and provisions; and it was used for that purpose for several years. It was paid for out of partnership funds, and was conveyed originally to John, who executed to Peter a deed of an undivided half.

John died March 10, 1842, leaving a widow and his only child Josephine, surviving. He had no property other than that in the copartnership. At his death, the firm was largely indebted, and to an amount exceeding their personal property. In order to aid in paying off the debts, the complainant, Peter Delmonico, entered into a written contract with the defendant, by which he agreed to sell and convey to him a part of the farm equal to three city lots.

At the time appointed for the payment of the contract price, the complainant tendered a deed of the three lots to the defendant, which he refused to receive because the former had no title to one undivided half of the farm, the same being vested in the infant Josephine. This bill was thereupon filed against Guillaume and Josephine, to compel the former to perform his contract.

A. Rapallo, for the complainant.

J. Anthon, for Guillaume.

G. Gifford, for J. Delmonico.

ASSISTANT VICE CHANCELLOR SANFORD. The proof is full and conclusive that the farm in Brooklyn was purchased by Peter and John Delmonico, while they were partners, for the partnership business, was used for that business, and was paid for out of the funds of the co-partnership.

It also appears that the debts of the firm, upon its dissolution by the death of John Delmonico, greatly exceeded the value of the personal property owned by the firm. So far as the partners and their creditors are concerned, real estate belonging to the partnership is treated in equity as personal property, and subjected to the same general rules.

In this case, therefore, Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John, he had an absolute right to dispose of it for the payment of the debts of the firm, in the same manner as if it had been personal estate. The authorities to this effect are numerous. Fereday *v.* Wightwick, 1 R. & M. 45; Phillips *v.* Phillips, 1 M. & K. 649; Broom *v.* Broom, 3 Id. 443; Cookson *v.* Cookson, 8 Sim., 429; Townsend *v.* Devaynes, 11 Sim. 498, n.; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Id. 582; Story on Partnership, §§ 92, 93; 3 Kent's Comm. 64, 5th ed. The case of Coles *v.* Coles, 15 Johns. 159, was at law. In Smith *v.* Jackson, 2 Ed. Ch. 28, the Vice Chancellor concurred in the doctrine of the cases before cited, to its extent as applicable to creditors.

Indeed, the cases of Phillips *v.* Phillips and Broom *v.* Broom go so far as to hold that this farm would be deemed personalty as between the real and personal representatives of the deceased partner. If that doctrine were applied here, the personal representative would be

a necessary party to the suit. I will not express an opinion upon the point adjudged in those cases.

There is no doubt that the legal title is vested in the infant defendant to the extent of one undivided half of the lots contracted to Guillaume. But the equitable right and interest being vested in the surviving partner, the infant is a mere trustee of the legal estate, and the Court of Chancery must compel a conveyance of the estate upon the application of such surviving partner. 2 R. S. 194, § 167; Broom *v.* Broom, *supra.*

The latter will be required to account for this property as a part of the assets of the co-partnership. If the complainant can make a good title in other respects, he may have a decree for specific performance. The guardian *ad litem* of the infant will join in the conveyance to Guillaume, executing it for and in the name of the infant. And the complainant must pay the guardian his costs of the suit.

WOODWARD *v.* McADAM ET AL.

101 Cal. 438: 35 Pac. 1016. 1894.

PATERSON, J. This is an action on a negotiable promissory note secured by a mortgage given by the defendant McAdam to Shoobert, Beale, & Co., and by the latter assigned to this plaintiff. The court below granted a decree of foreclosure as prayed for, and from such decree the defendant Jackson, who is a grantee for value by deed from McAdam given subsequent to the mortgage, has appealed.

The point made is that the mortgagee is a fictitious person — that the mortgage, having been made to a partnership doing business under a fictitious name, creates at most only an equity, and as against a subsequent grantee for value of the mortgagor establishes no lien.

There is no doubt that a partnership is not a person, either natural or artificial, and it cannot at law be the grantee in a deed or hold real estate. Legal title must rest in some *person*, but if the title be made to all the partners by name, they hold the legal title as tenants in common. In equity, however, a different rule prevails. There the real purpose for which the property was acquired is considered, and under the principles of trusts the court will regard real estate held for partnership purposes as personal property, so far as such holding may be necessary to settle the equities between a firm and its creditors, or between partners themselves. None of the latter principles are involved in this action, however.

If the name of the grantee were purely fictitious, that is, if no person were named, it may be that the mortgage would be void, although there is respectable authority for holding that a mortgage may be enforced in the firm name. Foster *v.* Johnson, 39 Minn. 380. In the

case at bar the names of two of the partners appear in the firm name. There is an important distinction to be drawn between a description which is inherently uncertain and indeterminate, and one which is merely imperfect and capable of different applications. "To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it." . . . Morse *v.* Carpenter, 19 Vt. 616.

In Moreau *v.* Saffarans, 3 Sneed, 599, 67 Am. Dec. 582, it was held that real estate purchased by partners is to be regarded in respect to the legal title as an estate held by them as tenants in common, but subject to a trust for the benefit of the partnership until the partnership accounts are settled, and that a conveyance to "J. L. Saffarans & Co." would operate to invest John L. Saffarans, individually, with the entire legal title, but that in equity he would be treated as holding the legal title in trust for the benefit of the partnership. In Menage *v.* Burke, 43 Minn. 212, the court sustained a mortgage of real estate to "Farnham and Lovejoy" as legally sufficient as a mortgage to Summer W. Farnham and James A. Lovejoy, it appearing that said persons constituted the firm of Farnham and Lovejoy. In Foster *v.* Johnson, 39 Minn. 380, the court explained Tidd *v.* Rines, 26 Minn. 201, cited by appellant, and held that in an action to foreclose a mortgage it was no objection that the mortgage ran to a partnership in its firm name. In Holmes *v.* Jarrett, Moon, & Co., 7 Heisk. 506, the court held that where the deed was made to Jarrett, Moon, & Co., and it did not appear whether the firm was composed of Jarrett, Moon, and others, or Jarrett Moon and others, the title would vest in Jarrett and Moon, or in Jarrett Moon, in trust for the partnership, and that the uncertainty arising from the omission of the Christian names of the grantee could be removed by parol proof. See also Brunson *v.* Morgan, 76 Ala. 594. In Winter *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57, it was held that a conveyance of land to L. B. & Co. vests the legal title of the same in L. B. alone, and that his deed would give to his grantee a good and valid title.

The judgment is affirmed.[1]

[1] In Davis *v.* Davis, 60 Miss. 615 (1882), the plaintiff brought a bill in equity to compel the defendant, among other things, to deed to the plaintiff "a one-half interest in land" which had been bought with firm funds by the partners, but which was conveyed to the defendant individually without plaintiff's knowledge. Chalmers, J., said the bill may be sustained "so far as it seeks a proper transfer of the legal title. That title, however, should be made to the firm of H. L. Davis & Co., since the allegations of the bill show not a purchase by co-tenants, but by partners for firm purposes. In resistance of this relief it will be admissible for defendant to show that complainant has no real or beneficial interest in the land, and for this purpose he can go into the general state of the accounts between the partners, either with or without a prayer for dissolution."

MAGRUDER, J., IN ROBINSON BANK *v.* MILLER ET AL.

153 Ill. 244: 38 N. E. 1078. 1894.

IN the case at bar the land was not purchased with partnership funds. The undivided one-third interest bought by John S. Emmons, was paid for by him with his own individual money. Miller also paid for the one undivided one-third interest, purchased by him with his individual funds. None of the money of the firm of Newton, Emmons, & Miller was contributed towards the purchase of the one-third interest held by Newton. Indeed, the proof shows that the firm of Newton, Emmons, & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one-third part of the property. No entries were made upon the books of the firm showing that the real estate was treated as firm assets. The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that after its purchase it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners, holding as tenants in common? . . .

The general doctrine of all these cases is that a purchase of the land with partnership funds is necessary to make it firm property. T. Parsons, in his work on Partnership (4th ed.), says: "Although it [real estate] be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or tenants in common. . . . So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." Sections 265, 266. In Hatchett *v.* Blanton, 72 Ala. 423, the Supreme Court of Alabama say: "Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property, — acquisition with partnership funds, or on partnership credit, and for the uses of the partnership." In Thompson *v.* Bowman, 6 Wall. 316, the Supreme Court of the United States say: "In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common." Buchan *v.* Sumner, 2 Barb. Ch. 165. The theory of some of the cases is that real estate bought with separate, and not partnership, funds, cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands, unless by writing, in view of the statute of frauds, except such as results by implication of law. Parker *v.* Bowles, 57 N. H. 491. There are cases which hold

that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. 1 Bates, Partn. §§ 281, 282. . . .

The weight of authority seems to us to support the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property. . . .

But even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgages thereon had notice, or reasonable ground for believing, that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and grain business were not necessarily notice of a partnership in the land. Now, it is well settled that a *bona fide* purchaser or mortgagee of firm property, from one of the partners holding the legal title, without notice of its partnership character, will hold it free from partnership claims. T. Pars. Partn. (4th ed.) §§ 277, 278; 1 Bates, Partn. § 291; Dyer *v.* Clark, 5 Metc. (Mass.) 562; Colly. Partn. (Perk. ed.) § 135.

WILD *v.* MILNE ET AL.

26 Beavan, 504. 1859.

THE plaintiff Wild, the defendant Milne, and the five other co-defendants were engaged in working a colliery called the Dean Colliery. They had obtained seven leases of different parts of the property for terms ranging between twenty-one and forty years. There were no articles of partnership, and no fixed term for its duration, but the partners were entitled in equal shares to the profits.

In consequence of some disagreements, the plaintiff gave notice to dissolve, and instituted this suit against his co-partners to have the

partnership wound up. It did not allege that there were any debts, but it prayed that the partnership property might be sold and applied in payment of the debts and liabilities, and that the surplus might be divided.

This was resisted by the defendant Milne alone, and the case was now brought on for hearing.

Mr. R. Palmer and *Mr. Eddis*, for the plaintiff.

Mr. Lloyd and *Mr. Fowler*, for Milne.

Mr. Bacon, Jr., for the other defendants, concurred with the plaintiff.

SIR JOHN ROMILLY, M. R. I am clearly of opinion that this is an ordinary case of partnership, and that, when it is dissolved or terminated, any one of the partners is entitled to have the whole assets disposed of. In this case, it is admitted that any one can put an end to the partnership: the result is, that that which forms the partnership assets must be disposed of for the purpose of settling the rights between the partners. I consider this established by Crawshay *v.* Maule, 1 Swanst. 518, 526, where the distinction between the individual interests of several persons in land, where there is a trading partnership, and where there is none, is adverted to. One of the cases points out the singular inconvenience which would follow, if I were to direct a sale of the plant and a partition of the land demised. Would the steam-engine be included in the division, and, if so, how could it be possible to make a partition of the remainder? Are all the parties to have the use of the shaft, or a right of descending by means of the machinery? The court is compelled, by the exigency and circumstances of these cases, to direct a sale. I shall, therefore, make the usual decree, and, according to the prayer of the bill, direct a sale.

The parties are entitled to an inquiry to ascertain how the partnership property can be most advantageously sold, and whether as a going concern or not.

Liberty to bid may be given to all the partners, except the one having the conduct of sale. Appoint a receiver and manager, with liberty to any party to propose himself, without salary.

KRUSCHKE *v.* STEFAN.

83 Wis. 373: 53 N. W. 679. 1892.

PINNEY, J. . . . 2. The evidence shows, we think, that the lots in question were partnership property, used and treated as such by the parties, and improved out of partnership funds, the title thereto, by agreement, having been taken in the name of the defendant, really for the uses and purposes of the co-partnership. The title was vested just as the parties intended it should be, and, although the property was realty, in the estimation of a court of equity it had been thus converted into personal

estate for all partnership purposes, and, with other partnership effects, was held subject to the payment of firm debts and losses, and the return of the capital originally advanced by each of the partners, when the residue, if any, would be subject to division between the partners, as profits; and if it consisted of real estate they would be entitled to hold the legal title as tenants in common. 1 Bates, Partn. § 282, Bird *v.* Morrison, 12 Wis. 138; Fowler *v.* Bailley, 14 Wis. 126; Roberts *v.* McCarty, 9 Ind. 16; Godfrey *v.* White, 43 Mich. 171; Bopp *v.* Fox, 63 Ill. 540; Martin *v.* Morris, 62 Wis. 418; Foster's Appeal, 74 Pa. 391; Andrew's Heirs *v.* Brown, 21 Ala. 437; Shanks *v.* Klein, 104 U. S. 18; Allen *v.* Withrow, 110 U. S. 119. The plaintiff, therefore, had no right to call for a conveyance of his interest as a tenant in common of the lots until the trust fastened upon them for partnership purposes had been fully satisfied. Until then the legal title must remain where the parties, by mutual consent, have vested it, and therefore the remedy of the plaintiff, if any, was only by action to dissolve the co-partnership, and for an accounting and proper application of assets. 2 Bates, Partn. § 910. The general rule is that an action cannot be maintained by one partner against his co-partner for a partial division of the assets of the firm, and this case does not fall within any recognized exception to the rule.

It is contended in support of the judgment that, where the title to partnership property has been wrongfully or improperly vested in one co-partner, the other may maintain an action to have the legal title vested in all the partners, according to the true intent of the parties, and its equitable ownership, without bringing an action for dissolution and winding up the affairs of the firm. The cases of Traphagen *v.* Burt, 67 N. Y. 30, and Davis *v.* Davis, 60 Miss. 615, are relied on. Both of these were cases where real property had been acquired with partnership funds, and for partnership purposes, but the co-partner conducting the transaction, without the knowledge or consent of the other partner, had procured the title to be conveyed to him which should have been conveyed to both, and in those cases it was held that the implied and resulting trust arising out of such breach of faith might be enforced without bringing a suit for dissolution and accounting. But these cases are clearly distinguishable from the present. Here there has been no violation of confidence or breach of faith by the defendant in taking the deed of the lots in question in his own name. The court finds that it was so taken in good faith, and was so taken for partnership purposes; and the lots became a part of the property and assets of the firm. This objection furnishes an additional and, as it seems to us, an incontestable ground for holding that the plaintiff's complaint should be dismissed. . . .

The judgment of the Circuit Court is reversed.

MOLINEAUX v. RAYNOLDS ET AL.

54 N. J. Eq. 559: 35 At. 536. 1896.

REED, V. C. This bill is filed for a partition of a tract of land, upon which is a factory, at Bergen Point, N. J. It is admitted that the present owners of the property are Charles T. Raynolds, Thomas B. Hidden, the two defendants, and Gen. Molineaux, the complainant. It is also admitted that they own it as partners. It is admitted by counsel that, if the property is subject to a partition suit, it should be sold, and not divided. Two questions are presented for solution: The first is whether the suit for partition is well brought. If it is properly brought, then the second question is, what are the proportionate interests of the owners in the property?

It is essential to a clear understanding of the second of these questions — and, in a degree, of the first — that the manner in which the property in question was created, and how it is now owned, should be set out in detail. It appears that previous to the year 1867 there existed a firm under the name of Raynolds, Pratt, & Co., of which firm the parties to this bill were members. In 1867 a new partnership was formed, consisting of four persons, namely, Raynolds, Hidden, Richardson, and Molineaux. By the terms of the partnership agreement, each was to put into the new firm, as capital, the amount of interest which each had had in the old firm of Raynolds, Pratt, & Co., and Molineaux was to put $20,000 in addition. This agreement continued until 1875. Between 1867 and 1870 one Aquilla Rich became a member of the firm, and in 1870 a deed for the property now in question was made to the five partners. In 1875 a new agreement was made between these partners. In this agreement the capital stock contributed by each was set forth. It was stated that Charles T. Raynolds' share of contributed capital was $450,000; Hidden's share, $250,000; Richardson's share, $138,000; Molineaux's share, $100,000; Rich's share, $33,000. By the terms of the agreement the net profits were to be divided as follows: To Raynolds, 33 per cent; to Hidden, 22½ per cent; to Richardson, 15 per cent; to Molineaux, 15 per cent; and to Rich, 12½ per cent. The several partners were to receive interest on their capital up to certain amounts, and were to share net profits according to the agreement above stated. This agreement continued until 1882, when another agreement was entered into. In this agreement, also, the amount of capital contributed by each was stated, namely, Raynolds, $450,000; Hidden, $250,000; Richardson, $138,000; Molineaux, $138,000; Rich, $33,000. The net profits were to be divided as in the last-mentioned agreement, and interest was to be paid on capital in the same way. In 1884 still another agreement was made. In this agreement the amount of capital stock contributed by each was stated as follows: Raynolds, $500,000; Hidden, $350,000; Richardson, $27,000; Molineaux, $160,000; Rich, $27,000. The net profits were

to be divided as follows: To Raynolds, 33 per cent; to Hidden, 24 per cent; to Richardson, 12½ per cent; to Molineaux, 18 per cent; and to Rich, 12½ per cent. Interest on capital was to be paid as before. This agreement was to last for five years. Shortly before the termination of this agreement three of the partners (the parties to this suit) purchased the interest of two of the parties, namely, Richardson and Rich, paying therefor the sum of $40,000. Each of the three purchasing partners contributed, to pay the consideration, the same proportions that they had contributed capital. Shortly after the purchase of these interests, Charles T. Raynolds having become insane, a new agreement was executed, by which the interest of Charles T. Raynolds in the personal property, machinery, and fixtures of the firm was purchased by the other two partners, together with one Edward H. Raynolds. By this arrangement all the property of the firm, except the real estate, was transferred to a new firm, consisting of Thomas B. Hidden, Edward L. Molineaux, and Edward H. Raynolds. By this agreement all the liabilities of the old firm were assumed by the new firm, with the exception of one liability, in the shape of a suit then pending against the firm, brought by one De Floras. This transaction wound up the business existence of the old firm, leaving as undivided assets the property in question, and one other piece of real estate, situate in Brooklyn, N. Y. These properties therefore belong to the members of the old firm, the three parties to this suit.

The first question mooted springs out of the existence of the De Floras suit. The counsel for the defendants insist that, so long as any claim against the old firm remains unsatisfied, so long each partner has a right to have the firm assets held as such to be applied in liquidation of the claim; that until all such claims are satisfied no partner has a right to demand a division of the firm property. The equitable rule thus invoked is entirely settled. The property of a firm, whether personal or real, is a fund to be primarily applied to the payment of its debts; and each partner has a right to have it so appropriated, to the end that he himself may be relieved from any personal liability to answer for the firm debts. In England, land as well as personalty belonging to a firm is regarded as personal assets. Lindl. Partn. § 343. In this country the land is held to be personal assets so far only as it may be needed to pay firm creditors. Bank *v.* Sprague, 20 N. J. Eq. 13; Freem. Partition, § 118. Out of this equity of each partner to have the firm property applied to the payment of firm debts, in order that he may be discharged from personal liability, has emerged the rule that the partition of the real property of a firm will not be decreed, so long as debts of the partnership remain unliquidated. Pennybacker *v.* Leary, 65 Iowa, 220; Kruschke *v.* Stefan, 83 Wis. 373; Mendenhall *v.* Benbow, 84 N. C. 646; Freem. Partition, § 443. By the rule laid down in these cases, the only method by which a partner, under such conditions, can compel a division of the firm property, is by a bill to administer and settle the partnership affairs.

It is apparent, however, that, inasmuch as the ground for refusing partition is that partners may be protected from future calls to pay firm debts, therefore if it should be made to appear that the property involved in the application for partition will not be needed to meet such obligations, the objection to the distribution of the property disappears. Now it appears in this case that there is other real estate in Brooklyn, belonging to this firm, of the value of $150,000. It also appears that the De Floras suit is pending in the courts of New York. The property and the pending suit are therefore both in the State of the firm's domicile. It is beyond the realms of probability that the final judgment in the De Floras suit, which suit has been dragging along for 20 years, can reach an amount which will begin to exhaust the Brooklyn property. Although it appears that a proceeding for partition of that property also had been commenced in the courts of New York, that proceeding has not gone to a decree, and it is in that suit that the defence set up here can be more appropriately interposed. Under these conditions, I do not see any substantial ground for thinking that the interest of any member of the firm will be menaced by the severance of the title to this property as is proposed by this suit.

The second question is therefore presented, what are the proportionate interests of these parties in this real estate? The contention of the complainants is that this real estate represents accumulated profits, and therefore should be divided in the proportions to which the several partners were entitled to share in profits. The contention of the defendants is that this real estate represents capital, and it should be divided in proportion to each partner's contribution of capital. Inasmuch as the partners under the different partnership agreements were entitled to share in profits in proportions differing from their proportionate contributions of capital, it follows that by the adoption of the one or the other of these theories the interest of the complainant in the firm property is differently affected. As has been already displayed, these partners had transacted partnership business under successive agreements from 1867. Each agreement set out the amount of capital which each partner had contributed, and prescribed the proportion of profits to which each partner was to be entitled during the term of the partnership. He was also to have the right to draw interest upon his capital. Now, some partners drew out all of their interest and all of their profits. Others let a portion of their profits or a portion of their interest remain in the business. By the apparent acquiescence of all the partners, the balance of those profits or interest remaining at the end of each year undrawn were added to the amount of the capital of those of the partners who saw fit to permit them to remain in the business. By reason of the unequal additions to the capital from year to year, the proportions of capital respectively contributed constantly shifted, and the total amount of capital contributed by all increased. Now, the theory of the complainant is that the original amount of firm property was increased by the employment of the profits which were

permitted to remain in the business in improving and purchasing property.

It is insisted that, by the sale of the personal property by the old firm to the new firm in 1889, the members of the old firm were paid for all the property which represented the product of the original capital, and that what remained is to be regarded as the product of the profits, and should therefore be divided as such. Now, it seems to be entirely clear that at the end of each year the net profits of the business were divided between the respective partners in the proportions in which profits were to be divided by the terms of the agreement. It is clear that when these profits were calculated and divided according to the terms of the agreement, and the share of each partner was put to his credit, then, as between the partners, these profits ceased to be assets of the firm, and became debts due from the firm to each member of the firm. The sum set apart to each partner at the end of each year was at the disposal of the partner as so much cash put to his credit. He could draw it out and use it as he chose. If he chose to invest it in the business, it was to be regarded as any other money which he saw fit to so invest. It became a part of the capital, or it became a loan, just as he and the partners agreed. That they agreed to regard these sums as additions to the capital appears beyond all question. Up to 1884 there was not merely a division of calculated profits, but such calculation included all profits, so that apparently nothing existed in the shape of undivided earnings. This appears from a fact I think proven, i. e., that in the calculation of profits all moneys spent in betterments were eliminated from the debit side of the account. Mr. Mather, the book-keeper, swears positively that no expense for permanent improvement, but only expenses for repairs to the real estate and machinery, were deducted from the gross earnings of the business, in arriving at the net profits.

Each partner therefore received as a credit for his share of the profits the same amount that he would have received had no permanent improvements upon the firm property been made. The expense of the permanent improvement was a debt against the firm assets, and, when paid, was necessarily paid out of the new capital which the partners contributed, by leaving a portion of their credit for profits and interest in the business of the firm. This portion, as already observed, after being calculated and credited was equivalent to cash, and, if left in the firm business, is to be regarded as capital. Again, each of the parties has acquiesced in the view that his interest in the property was in proportion to his contributions of capital.

In March, 1889, as already stated, the interest of two of the partners, Richardson and Rich, was purchased by the three remaining partners. The interest of these two partners, whether something or nothing, was paid for by the three partners in proportion to their capital. The purchase eliminated any claims which the selling partners might have had to share in the assets of the firm, and transferred such claim to the

three remaining partners. The manner by which this purchase was made and paid for indicates that the view of the parties was that the right of each in all the assets was in proportion to his capital. Again, in May a new firm was formed, composed of the two old members, Hidden and Molineaux, and a new member. By reason of Raynolds' insanity, it became essential to ascertain the amount of Raynolds' interest in the firm. The ascertainment of this necessarily involved the ascertainment of the proportionate interests of Hidden and Molineaux. In accordance with the result of this adjustment of values, the personal assets of the old firm were to be turned over to the new firm. An expert was put upon the books to discover any error in book-keeping which might have crept in during the number of years covered by the partnership transactions, so that a final accurate account might be stated. With the consent of all the parties connected with the old and the new firms, such an account was stated; and upon the basis of such statement the personal property of Raynolds was purchased, and the personal property of Hidden and Molineaux in the old firm was transferred to the new firm. In making up the valuation of the property of the old firm, the real estate was valued at $289,200. The real estate did not pass to the new firm, but was retained by the three old members. In fixing the value of all the property, the value of the real estate was deducted. In fixing the value of the interest of each partner in all the property, his proportionate interest in the real estate was deducted from his proportionate interest in all the property. Now, the deduction on account of Raynolds' interest in the real estate was calculated in accordance with the relative amount of capital which he had contributed to the firm. In other words, his share in the personalty was sold upon the theory that his proportionate interest in the real estate, as well as in the personalty, was $\frac{62}{101}$, and the real estate was retained upon that theory. It will be perceived that the adoption of this theory in respect to Raynolds' interest involved as a sequence the adoption of the same theory with respect to the interest of Hidden and Molineaux. It is also perceived that if Molineaux's proportionate interest in the real estate, as is now claimed, is not in proportion to his capital contributed, which is $\frac{18}{101}$, but is 2 per cent more, then it follows that the deduction from the amount received by Raynolds on account of his interest in the real estate retained was excessive, and therefore what he received for the personalty was inadequate. This follows from the fact that, if Molineaux's share was larger, Raynolds' must be smaller, else the proportions could not be preserved. In fact, to accord to Molineaux what he now claims, the entire settlement must be overturned, and a new one adopted.

In view of these facts, namely, that from 1867 to 1889 the profits have been divided; that they have been, if the partners pleased, added to the capital; that the purchase of the two partners' shares was made upon the basis of the proportion of capital contributed; that the calcu-

lation and settlement of the Raynolds interest in all the property were made upon the same basis; that the books of the firm were open to each member of the firm; and that at the end of each year, as Mr. Mather says, the balance sheets of the firm's business and division of profits were given to each partner, and invoked no complaint, — I say that in view of all this no court would be justified in unsettling this deliberate adjustment of the partnership affairs, unless in case of fraud or gross mistake. No such fraud or mistake is apparent.

But the complainant insists that, by the sale made by the old firm to the new firm in 1889, all the capital contributed by the parties to this suit to the firm business was paid, and therefore the real estate left remaining must be divided as profits. The legal ground upon which it is sought to raise this insistence is well established. Upon the dissolution of a partnership, after the payment of firm liabilities, the amounts contributed as capital by each partner are to be paid. If there is a surplus it must be divided as profits, and if there is a deficit the loss must be borne in the same ratio. Mr. Justice Lindley, in his work on Partnership (margl. p. 402), lays down the following rules for the adjustment of partnership accounts upon dissolution. The assets are to be applied (1) in paying the debts and liabilities of the firm to non-partners; (2) in paying to each partner ratably what is due from the firm to him for advances, as distinguished from capital; (3) in paying to each partner ratably what is due from the firm in respect of capital; (4) the ultimate residue, if any, will then be divisible as profits between the partners, in equal shares, unless the contrary can be shown.

It follows, of course, that if the contrary is shown the residue must be divided in accordance with such showing. There can therefore be no doubt that, upon the assumption that there was a surplus, the parties to this suit, as partners, were entitled to be paid, before the division of such surplus, only the amount of capital which each had contributed. Nor can there be a doubt that whether by the enhancement of the value of the real estate, or from any other cause, such surplus existed after the payment of the capital, such surplus would be divisible as profits. Robinson *v.* Ashton, L. R. 20 Eq. 25.

As already shown, all the earnings, so far as they could be calculated, had either been drawn out by each partner, or had by him been transmuted into capital. Whether there would remain any additional surplus in excess of the amount of contributed capital could only be ascertained by a sale of all the firm property, or by a sale of a part and an estimate of the value of the remainder, or by an appraisement of the value of all, and a division of the same according to the estimated value of the several portions.

In 1889 the old firm, as already observed, was dissolved by the insanity of C. T. Raynolds, and a new firm was formed by Hidden, Molineaux, and another Raynolds. The committee of C. T. Raynolds sold his interest to the new firm, and Hidden and Molineaux transferred their interest in the old to an interest in the new. The property of the

old firm was not exhibited for sale, but by an agreement between the committee of Raynolds and Hidden, Molineaux, and Edward Raynolds, a price was fixed for all the property of the firm in excess of its liabilities, excepting the De Floras suit. The price or value of all this property was fixed at $1,316,725. At the close of the firm's business the amounts due the partners were: To Raynolds, $583,994.97; to Hidden, $587,568.28; and to Molineaux, $145,162.37. The total was the same as the amount of the estimated value of the firm assets. The amount of such assets was in fact diminished by a deduction made for depreciation in value of the machinery, and on account of the irrecoverable overdrafts of Richardson and Rich.

What was actually paid to the committee of Raynolds was his share in the amount of the assets remaining after such deduction, namely, $539,346.76. Hidden's share was estimated and turned over upon the valuation of $556,314.52, and Molineaux's at the valuation of $130,874.94. From these amounts was deducted the estimated value of each partner's share in the retained real estate, and the balance was paid for in cash, or credits of different kinds upon the books of the new firm. Now, in the agreement of 1884 it was stated that the amount of capital contributed by each was: Raynolds, $500,000; Hidden, $350,000; and Molineaux, $150,000. If the subsequent profits, which had been divided, and credited to Raynolds and Hidden, and left undrawn, together with the undrawn interest, are to be regarded as additional capital, then it is perceived that all the property of the firm was needed to pay capital.

If it should be conceded that the amounts to the credit of Raynolds and Hidden in excess of the $500,000 and $350,000, respectively, represented profits and interest, then such shares of undrawn profits so divided and credited, together with the interest, were debts of the firm to the partner, as for advances. Therefore, in pursuance of the rule already announced, they were payable before the capital. After such payment the remainder of the firm property, as valued, was insufficient to pay the amounts of capital stated to have been contributed in 1884. In this balance Molineaux would have the right to share in the ratio of $\frac{15}{101}$, assuming that his capital has not been depleted. If, as in fact, it has been depleted, then his share would be less. The real estate representing a portion of such balance of the firm assets is divisible in the same ratio. I am unable to perceive how the complainant's interest in the real estate can exceed $\frac{15}{101}$, upon any hypothesis which has been or can be propounded.

I will advise a decree in conformity with these views.

GOLDTHWAITE *v.* JANNEY ET AL.

ABRAHAM *v.* SAME.

102 Ala. 431: 15 So. 560. 1894.

HARALSON, J. The sole question for decision in this case, as respects the rights of the Abraham petitioners, is whether the property in question belonged to the individuals composing the firm of Moses Bros., or to the firm itself; and, Goldthwaite, receiver, has, also, an equal interest in the determination of that question. If it was individual property, it must be distributed among the individual creditors of that insolvent firm; but, if in equity it belonged to the partnership, it is to be distributed, with the other property belonging to the firm, to its creditors. There was real estate, the title to which stood in the names of the individual members, and stocks standing on the books in the names of one or another of the individuals, schedules of which real estate and stocks are attached to the petitions. These lands and stocks were included in the general assignment of Moses Bros., and came into the possession of the appellees, as assignees, and they claim them as the property of said firm, subject to distribution among its creditors, and not to the creditors of the individuals composing the said firm, whereas, the petitioners claim said property as belonging to the individuals in whose names the bills appear, and not to the firm of which they were members.

It is a rule of universal recognition, that real estate acquired with partnership funds, or on partnership credit and for partnership purposes, is regarded in a court of equity as partnership property, and is subject to the payment of partnership debts, in preference and priority to the separate debts of the several parties; and it is wholly immaterial, says Judge Story, in the view of a court of equity, in whose name or names the purchase is made and the conveyance taken, whether in the name of one or of all the parties, or in the name of a stranger, alone, or jointly with a partner. In all these cases, let the legal title be where it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the *cestuis que trustent* therefor. 2 Story, Eq. Jur. § 1207; Hatchett *v.* Blanton, 72 Ala. 435; Little *v.* Snedecor, 52 Ala. 167; Offutt *v.* Scott, 47 Ala. 104; Coles *v.* Coles, 1 Hare & W. Lead. Cas. 492, note; and Dyer *v.* Clark, Id. 495, note. Whether the land belongs to a firm or to one of the individuals composing it, — when the title is in his name, and not in that of his firm, — it must be solved by what appears to have been the intention of the parties. *Prima facie*, ownership is where the muniment of title places it; but if by all the circumstances attending the transaction, — which may be shown by parol, if there is no written evidence, — it is made to appear that in the intention of the parties, it was purchased for and was treated as partnership

property, that presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership. Authorities *supra.*

It has been insisted that when a partner buys real estate for his firm with its money, and takes the title in his own name, which title is spread upon the records of the county, those who have financial dealings with him are presumed to have done so on the faith and credit of that property, and the partnership is estopped afterwards to claim the property against the claims of the creditors of such partner. This doctrine is true, certainly, in cases of *bona fide* purchasers of such property for value, and without notice that it belonged to the partnership. But it cannot be extended further, without overthrowing all our adjudications on the subject, as well as the general current of authorities, everywhere. No man has a lien on the property of another with whom he deals, whether he is a member of a partnership or not, unless it is conferred by contract or by some rule of law. A creditor of one who is a member of a partnership can never put his hand on such a partner's interest in the firm, until the assets of the firm have been applied to the full payment and discharge of all debts and liabilities of the partnership, and, after discharging these, the residuum is still held in trust for distribution among the several partners, according to their several interests. A lien exists in favor of each partner on the partnership effects to secure these results, and for the one as well as the other. This lien, as a general thing, exists only in favor of the several partners. They may sell the firm's property, may convey it to one of their own number, may partition or divide, and the lien will thereby be destroyed.

Creditors as such cannot be said to have any lien on the partnership effects. There are conditions in which a creditor has been allowed to avail himself of this *quasi* lien of a partner, but it is derivative only, and not of original existence. But in no event can a creditor of an individual partner acquire any greater interest in the assets of the firm of which the partner is a member than the partner himself is entitled to, which is nothing, if the partnership is insolvent. The stream in law, no more than in nature, can rise higher than its source.

Lindley, in his work on Partnership, states the principles so aptly, we quote what he says on the subject. Subject to certain exceptions, within which this case does not fall, he says: "It is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. If, therefore, a partner is a creditor of a firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. Lord Hardwicke, it is true, in *Ex parte* Hunter, 1 Atk. 223, allowed this to be done; but that case has not, in this respect, been followed,

and has long been considered as overruled." 2 Lindl. Partn. p. 720, § 721, and authorities cited; Hart *v.* Clark, 54 Ala. 490; Warren *v.* Taylor, 60 Ala. 218; Farley *v.* Moog, 79 Ala. 153; Goldsmith *v.* Eichold, 94 Ala. 116; Buchan *v.* Sumner, 2 Barb. Ch. 167; Jones *v.* Fletcher, 42 Ark. 422; Paige *v.* Paige, 71 Iowa, 318; Story, Partn. §§ 97, 360, 361; 13 Am. & Eng. Enc. Law, 611; 17 Id. 1195.

The written agreement executed between the partners on the 17th May, 1879, recites that, in the course of their business, the three brothers composing the firm of Moses Bros. had acquired titles to real estate in the individual names of the one or the other of said parties, and it was provided by that agreement, that all real estate or interest therein then held by either of the members of that firm, in his individual name, was the property of the partnership, having been brought into the firm, or bought with its funds for partnership purposes. The testimony of M. C., H. C., and A. H. Moses, taken before the registrar, shows that the acquisition of real estate, after that agreement was signed, continued as before, viz., that in many instances the title was taken in the name of the partner effecting the transaction, but all real estate, whether the title was so taken, or in the name of the firm, was bought for the firm, paid for out of its funds, and was taken and treated as its property, and not as the property of the member in whose name the title stood, excepting the residences of H. C. and A. H. Moses in Montgomery, and the residence of said A. H. Moses in Sheffield, and a lot given to him in Sheffield by the Sheffield Iron & Coal Company. A careful review of all the evidence satisfies us that the decree of the Chancery Court on this question was correct.

Let us now refer specially to the petition of Robert Goldthwaite, as receiver in the case of Paul *v.* Knox, in which it is stated that petitioner's claim had been adjudicated and allowed in this case, for $18,108.11, as a claim against the estate of H. C. Moses; that said claim arose on account of trust funds in said Moses' hands as a receiver in the case of Paul *v.* Knox, which he advanced to the firm of Moses Bros., of which he was a member, without taking the security required by the court; that Moses Bros. were indebted to said H. C. Moses for said advances at the time of the general assignment made by them and as members of said firm, and are still indebted to him for the same, and at the time of said assignment, "besides the property belonging to H. C. Moses individually, and to which he had the legal title, he also held the legal title to some real estate, which in equity belonged, after the adjustment and payment of the claims of said H. C. Moses against said firm, to said firm of Moses Bros.; that as between said H. C. Moses as an individual and the said firm of Moses Bros., the said H. C. was at most the trustee of the legal title of the property so held by him for said firm after the adjustment and payment of the said debt due by said firm to him, on account of said funds so advanced by him for the use of said firm, and that said property to which he, said H. C. Moses, thus held the legal title

individually, was the individual property of said Henry Moses in equity, to the amount and extent of said advances, for said firm, and being so, petitioner as the creditor of said Henry C. Moses and the holder of said debt is entitled to have said property regarded as the individual property of said Henry C. Moses, and to be paid out of the proceeds thereof, if the same is sufficient therefor." We have quoted this language of the petition to show the more plainly the position and contention of the petitioner. In short, this is the statement of the proposition, that real estate belonging to a partnership, but standing in the name of one of the partners at the time of the insolvency of the firm, is the individual property of such partner to the extent of his claim against the firm, so that, to such extent, such property must be distributed among his individual creditors, rather than among the creditors of the partnership.

When H. C. Moses lent the money in his hands, as receiver, to Moses Bros., he was guilty of a breach of trust, in which his firm participated, if they knew the character of the fund that was lent them. By so doing he incurred a personal liability on himself to account for the money, and the borrowers, if chargeable with a knowledge of the violated duty, incurred a similar pecuniary liability; but, in contracting the debt, even if they participated in the breach of duty, — as we before now, in reference to this same matter, decided, — that fact did not change the nature of the obligation, so as to fasten a lien on their property for its payment. A lien, as we have said, is never an incident of a contract or money obligation unless made so by the contract or by some rule of law. The proposition submitted does not differ materially from the same question presented and decided in cases heretofore before us on appeal. It cannot be sustained without overruling these and many other cases in this and other courts. Goldthwaite *v.* Ellison, 99 Ala. 497; Ellison *v.* Moses, 95 Ala. 221; 17 Am. & Eng. Enc. Law, 1195, and notes 2, 3.

What we have said is equally applicable to each of the cases set forth in the transcript, — that of Robert Goldthwaite, receiver, *v.* Janney & Cheney, trustees, etc., and of Adolph Abraham and others against same parties. There was no error in the rulings of the court below, and the decrees in each case must in all respects be affirmed. Let the appellants, each, pay one-half of the costs of this appeal.

Affirmed.

WOODWARD-HOLMES CO. *v.* NUDD ET AL.

58 Minn. 236: 59 N. W. 1010. 1894.

MITCHELL, J. The effect of the findings of the trial court is that the real estate which is the subject of this action was formerly the property of a manufacturing co-partnership composed of defendant's husband and

one Holmes, having been purchased, paid for, and used by the firm as a site for its manufacturing plant, the title being taken in the individual names of the partners; that, in an action brought by one partner against his co-partner to dissolve the partnership and wind up its affairs, the property was ordered sold as one parcel, the proceeds to be applied in payment of the firm debts, and the surplus, if any, divided between the partners according to their respective rights; that at such sale it was sold to plaintiff's grantor for an amount somewhat in excess of the sum required to pay the debts of the firm; that this surplus was distributed between the partners, no part of it being paid to defendant; that defendant was not a party to the action, and has never joined in any conveyance of the property. The defendant, as wife of one of the partners, claimed an inchoate interest in an undivided half of the premises, and this action was brought to determine this adverse claim.

It is well known that the English doctrine was that partnership real estate is considered as personal property for all purposes. The doctrine of the American courts on the subject is more restricted. Some of the earlier decisions in New York and Massachusetts went almost to the length of entirely subverting the equity doctrine prevalent in England; but, as remarked by Chancellor Kent, the other American decisions are not inconsistent with the more correct and improved view of the English law. It is now held with practical unanimity by the American courts that, if partnership capital be invested in land for the benefit of the company, all the incidents attached to it which belong to any other stock, so far as consistent with the statute of frauds and the technical rules of conveyancing, and that it will be treated as personal estate until it has performed all its functions to the partnership, and thereby ceases to be any longer partnership property, and until then it is not subject to either dower or inheritance, but that, after all the purposes of the partnership have been thus accomplished, whatever land remains in specie will be regarded as real estate. The question is at what precise moment is it reconverted into real estate, or, to speak more accurately, does it resume all the attributes and incidents of real property? We think the answer is, the moment the partnership is terminated and wound up by judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. When a partnership is dissolved, and its affairs wound up and completely ended, and any land remains in specie, unconverted, this must be deemed a determination that it is no longer a part of the co-partnership stock, and an election to hold it thereafter, individually, as real estate.

During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and

the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personalty, or ceased to be partnership property. And what the partners may thus do voluntarily the court may do for them, in an action brought to dissolve the partnership and wind up its affairs. As the defendant was not a party to the former action, she is, of course, not estopped by it, nor is it evidence against her of anything except of the fact of its own rendition. But the material fact remains that in the process of the dissolution of the firm, and the winding up of its affairs, in an action for that purpose, the land was sold and converted into money, and the money distributed among the creditors and partners according to law. Upon these facts, under the rules already announced, the land in the hands of the purchaser is not subject to any inchoate interest of the wives of the partners.

The error which lies at the foundation of the whole argument of defendants' counsel is in the assumption that, at the time of the purchase of this property, it became the individual real estate of the husband, and that the inchoate right of the wife under the statute immediately attached, subject only to a lien for the payment of partnership debts. This is not correct, and none of the authorities that we have found so hold. The fact is that only so much of it becomes the individual real estate of the partner as remains in specie, unconverted, after all the purposes of the partnership have been entirely fulfilled, and it is only to such of it that any inchoate interest of the wife ever attaches. If counsel's contention is correct the partners could never, even during the active life of the co-partnership, convey perfect title to partnership land without their wives joining, except to the extent actually necessary to pay existing debts of the firm. This would practically involve, in every case where one of the wives refused to join in a conveyance, the necessity of a suit to which she is made a party, in order to determine whether the sale was necessary to pay debts. Any such rule would hamper the business of the firm to an extent that might practically defeat the purposes of the partnership.

The court below seems to have laid special stress upon the fact that it was not made to appear on the trial that it was necessary to have sold all this property to pay the debts of the firm, but this is immaterial, either under the view of the law which we have taken, or under that urged by counsel. In fact, we understood counsel to frankly concede this on the argument. Upon the facts found, judgment ought to have been ordered in favor of the plaintiff, adjudging that defendant has no interest, inchoate or otherwise, in the land.

Cause remanded, with directions to the court below to render judgment accordingly.

DAVIS ET AL. v. SMITH ET AL.

82 Ala. 198. 1887.

CLOPTON, J. The land sued for was formerly the property of the firm of Lyman & Davis, purchased with partnership funds, and used for partnership purposes. The partnership having been dissolved by the death of Davis, Lyman, as surviving partner, sold and conveyed the land, in May, 1876, in part payment of a firm debt, to Malone & Foote, under and through whom the defendants claim to hold. The appellants, who bring the action, claim title as the heirs of Davis, and defendants concede their right to recover, unless the conveyance of the surviving partner passed the legal title to the grantees. The solution of the question depends on the construction of a clause contained in supplementary articles of co-partnership entered into November 28, 1867, which is as follows: "That all the real estate whatever, belonging to the said firm of Lyman & Davis (the same having been purchased solely with partnership funds), shall be, and is hereby considered as part of the joint-stock and funds of said firm of Lyman & Davis, and as possessing all the incidents and liabilities of partnership funds and personal property, and is hereby by the parties fully impressed with such incidents and liabilities."

To a better and clearer understanding of the purport and intention of this clause, it should be stated that the partnership was originally formed in 1865, to carry on a mercantile business in Selma. The declared purposes of the supplementary articles are to provide for circumstances which had arisen and were not provided for by the previous agreement; for the extension of their joint business to manufacturing in Montevallo; and in the event of the death of one of the partners, for continuing the business for a limited period, and the final settlement of the affairs of the firm. By an instrument in writing, made by Davis, December 18, 1867, which he designates a codicil, it is declared that specified parts of the supplementary articles, being the provisions relating to the continuance and settlement of the partnership business after the death of one of the partners, including the clause above quoted, "shall be taken and considered as my last will and testament, as to all matters and things therein contained;" and both instruments were duly probated as his will, which is conclusive as to their testamentary character. Matthews v. McDade, 72 Ala. 377.

By the settled doctrine in this State, the real estate of a partnership is in equity considered as personal, so far as may be necessary for the payment of the debts, or for an adjustment and equal settlement between the partners. Upon the dissolution of the partnership by the death of a member, the survivor is charged with the duty of paying the debts. To enable him to discharge this duty, he has the right to dispose of the real estate for this purpose. While his deed will not pass the legal title, it will convey an equity, through which the purchaser

may compel the heir-at-law of the deceased partner to perfect the purchase by a conveyance of the legal title which he holds in trust to pay the debts. Andrews *v.* Brown, 21 Ala. 437; Espy *v.* Comer, 76 Ala. 501. In the case last cited it is said: "But this is purely an equitable doctrine, and the legal title, with all the characteristics of realty, attaches to it, until it is so applied to partnership wants." In the absence of an express provision in the contract of partnership, the real estate "only becomes personalty *pro tanto.*" The intent of the understanding and direction, that the real estate shall be considered as possessing all the characteristics and liabilities of personal property, and impressing it with such incidents and liabilities, is declared by the introductory phrase immediately preceding, "for the purpose of facilitating and simplifying the settlement and winding up the said firm." The manifest design is to impress the real estate with the incidents of personal property, both at law and in equity, as between the parties to convert it into personalty; not an equitable conversion *pro tanto*, but a conversion *in toto*, for the purpose of closing and settling the partnership affairs; and to confer rights and powers on the surviving partner which are not incident to the relation nor implied in the mere contract of partnership.

The parts of supplementary articles, having reference to the contingency of the death of one of the partners, make special provisions for the management and settlement of the business in Selma, and authorize the surviving partner to sell the real estate situated in that place, at such time and on such terms as he may consider best for the interest of all concerned, requiring the personal representative of the deceased partner to join in any deed necessary to convey a perfect title both at law and in equity. If he did not deem it advisable to sell the real estate in Selma, when he closed the mercantile business, he was authorized to lease it; but in no event should a sale be postponed beyond five years from the death of the deceased partner. The surviving partner is authorized to take the entire interest in certain designated lots in Montevallo at a fixed price, and the personal representative of the deceased partner is required to make a conveyance if he elected to take, but no provision is made for selling to others. The firm owning other real estate, which includes the land sued for, after making the foregoing specific provisions, which for some reasons were deemed specially material, the partners incorporated the general clause above quoted, relating to all the real estate. What is the legal effect of such stipulation in a contract of co-partnership? Though at first there was opposition in England to recognizing realty as a part of partnership stock, in Thornton *v.* Dixon, 3 Brown Ch. 199, Lord Thurlow said, that if the agreement had been that the lands should be valued and sold, it would have converted it into personalty; but that the agreement in the case before him was not sufficient to vary the nature of the property. Here is a distinct recognition of the authority of the partners to effect a conversion by agreement. The courts being forced, by

the necessities of trade, to hold that realty may become a part of the partnership stock, by a series of subsequent decisions, the doctrine was established; and it is now the settled rule in England, that when real property is purchased with partnership funds for partnership purposes, the transaction, by force of the contract, in the absence of a special stipulation, makes it personalty, effecting a conversion out and out. Darby *v.* Darby, 3 Drew. 495. The doctrine is rested on the ground that by the contract of partnership all the firm property, real and personal, is to be sold on a dissolution. This goes further than the American rule, by which the real estate not wanted for partnership purposes to pay the debts, or to equalize the benefits and burdens between the partners, remains realty, subject to all incidents, as such, in the hands of those holding the legal title. Nevertheless the parties may, by express agreement, stamp it with the character and qualities of personal property. The supplementary articles, by the express and special stipulations of the deceased partner under which he became joint owner, impress the real estate with "all the incidents and liabilities of partnership funds and personal property," thereby placing it on the same legal footing and in the same legal position as the personalty. The specific performance of the stipulations of the contract, in respect to the settlement of the business and the disposition of the firm property after the death of one of the partners, would itself convert the real estate into personal assets. Wilcox *v.* Wilcox, 13 Allen, 352.

Such being its effect and operation, what are the rights and powers of the surviving partner, under such contract of co-partnership? In determining these, we are not left to imply them from the supplementary articles alone, for in connection therewith, the codicil may be properly considered. The testator prefaces the dispositions of his individual property, as made by the codicil, with the declaration that by the supplementary articles he "did provide, give, and grant all necessary arrangements, directions, and powers for the conduct and management, control and winding up and settlement" of all the firm matters. The partners exhibit entire confidence in the business capacity and integrity of each other; and the predominant purpose is to facilitate and simplify the settlement of the partnership affairs by the survivor, on whom the right and duty are devolved by both the will and the law. To consummate this controlling object the parties agreed to impress the real estate with all the incidents and liabilities of partnership personal property, and directed that it should be considered a part of the joint-stock and funds, and as possessing all such incidents and liabilities. The question arises, what are the incidents and liabilities which attach to the personalty, and not to the realty, belonging to a partnership? They may be regarded as legal in their nature and character, as distinguished from merely equitable. On dissolution by the death of a member, the survivor has the right and power to sell and pass the legal title to the personal property, though there may be no firm debts, and a sale is necessary only for the settlement of the

partnership, and the distribution of the assets; but he has a right to sell the real estate only when required for the payment of debts, or for an adjustment and equalization of the partnership accounts, and then can convey only an equitable title. Both kinds of property are subject to the debts, but the primary liability rests on the personal assets, on the insufficiency of which depends the right of the survivor to dispose of the real property, and without the exhaustion of which a court of equity will not charge the realty in favor of a creditor.

The parties evidently contemplated and designed that in winding up and settling the firm matters, all the property, both real and personal, should be sold by the survivor, without reference to the necessity of its use to pay debts, or to adjust the accounts. The general conception is the conversion of the real into personal property, both possessing the same incidents and liabilities, so that the real and personal assets shall constitute a joint-stock, which or any part whereof the survivor had the right to dispose of in his discretion, and as he deemed most advisable for the interests of all parties, to remove impediments to speedy and advantageous sales, and to relieve the survivor of the difficulties and embarrassments which might prolong a full and complete settlement. Unless the clause under consideration makes the realty chargeable with the debts equally with the personalty, whether at law or equity, unless it gives the survivor the power to sell the real estate the same as the personal property, it is without meaning, and has no field of operation. No precise form of words is necessary to create a power; it will be implied when the intention is manifest to enable an execution of the trusts devolved. As the intent is apparent, that all the property of the partnership, real and personal, shall be sold for the purpose of settling its affairs, and that a division of the residue should be made by the survivor between the parties entitled, the power to sell necessarily follows. Winston *v.* Jones, 6 Ala. 550.

This conclusion is strengthened when the codicil and the supplementary contract are considered together in respect to the appointment of executors. By the contract it is stipulated that the surviving partner shall be nominated co-executor with any other person appointed by any codicil or will thereafter made. In pursuance thereof, the testator, by the codicil, nominated John T. Davis, his son, and the surviving partner executors, " with full and plenary powers to sell and convey real estate, and to do all acts needful to carry out the true intent and meaning of this codicil, and the last will and testament to which it is added as aforesaid." When it is observed that the power to settle the partnership is a personal trust vested in the surviving partner; that the personal representative, other than the survivor, is required only to unite in and make conveyance in specified instances; and that full and plenary powers are conferred *eo nomine* to sell and convey real estate, and to do all acts necessary to carry into effect the intent and meaning of the supplementary articles — the intention of the testator cannot be misunderstood nor mistaken. It is apparent that in respect to the sale

of the firm property the power was not intended to be a joint power, from the fact that the son was a minor, and another person is appointed to act as executor until he attained his majority, upon whom no special power is conferred, and who is exempt from responsibility except for assets actually received by him. His active duties relate to the individual estate of the testator; and there is no provision for continuing the partnership business except at the discretion of the survivor, whose principal and constant aim shall be as speedy settlement as may be consistent with the interests of all parties.

We hold that by the clause impressing the real estate with all the incidents and liabilities of partnership personal property, in connection with the other provisions of the will, considered as an entirety, the same power is conferred on the surviving partner to sell the real which he has by law to sell the personal property, and that his conveyance as such conveys the legal title, unless when otherwise specially provided.

Affirmed.

POND *v.* KIMBALL.

101 Mass. 105. 1869.

AMES, J. This report finds that the property described in the plaintiffs' declaration belonged to them as co-partners. It had been procured by them to be used in their shop, as appropriate to and usual in the prosecution of their joint business. A portion of it falls within the description of "tools and implements" necessary to the prosecution of their trade and business, and another portion under that of "materials and stock" necessary for the same purpose, and intended to be used or wrought therein. The claim of the plaintiffs is, that on both these grounds a portion at least of the property was exempt from attachment; and that the defendant is liable in this action for the wrongful act of his deputy in making such attachment.

This claim, then, raises the question whether the exemption of certain property from attachment, provided for in the Gen. Sts. c. 133, § 32, cl. 5, 6, and c. 123, § 32, applies to the case of property belonging jointly to two or more co-partners. It does not appear that, at the time of the attachment, the plaintiffs had dissolved partnership, or had divided their joint property, or had had a general settlement and winding up of their business. We agree with the plaintiffs' counsel, that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it, consistently with its true and just interpretation. There are many difficulties, however, in the way of applying it to the case of co-partners and joint owners, and these difficulties we find to be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partner-

ship property. On the decease of one member of the firm, it would go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern, and paying its debts. In the case of numerous partners, can it be said that each would have the right to claim, as exempt from attachment for the joint debts, one hundred dollars' worth of tools and implements, and another hundred dollars' worth of materials and stock; or is the whole firm to be considered as one debtor only? Does the exempted property in that case belong to the partners jointly, or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless possibly the clause as to fishermen (Gen. Sts. c. 133, § 32, cl. 9) be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessaries, out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm.

The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership and combine his means with those of one or more than one other person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemptions as to that kind of property.

The view which we have taken of the case has rendered it unnecessary to consider certain other questions which were discussed in the argument.

The result is, that the plaintiffs are not entitled to maintain their action; the verdict must be set aside, and judgment entered for the defendant.

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§ 3. Firm Title Devested by Act of the Firm.

BOLTON *v.* PULLER et al.

1 Bos. & P. 539. 1796.

Forbes, Gregory, Caldwell, and Smith were partners in banking at Liverpool, and Forbes and Gregory carried on a separate banking-house in London. J. Bolton, having accepted bills payable at the bank of

Forbes and Gregory, employed Forbes, Gregory, Caldwell, & Smith to get them paid there, and agreed to deposit with them good bills indorsed by him for the purpose of enabling them to do so. Accordingly, Forbes, Gregory, Caldwell, & Smith debited Bolton in account for his acceptances, and credited him for all bills which he deposited. Some of the bills so deposited by Bolton were remitted by the Liverpool house to the London house upon the general account between the two banks; and before the acceptances of Bolton became due, both houses failed, and Bolton was obliged to pay his acceptances. He brought trover against the assignees of Forbes and Gregory for the bills so deposited and remitted.[1]

The case was first argued by *Williams, Serjt.*, for the plaintiff, and *Heywood, Serjt.*, for the defendant; and a second time by *Adair, Serjt.*, for the former, and by *Le Blanc, Serjt.*, for the latter.

Eyre, Ch. J. The question is, whether the plaintiff can maintain this action upon this case? For him it is urged that the house in London is a house of trade, carried on by two of the partners in the banking-house in Liverpool; though it is admitted that the trade carried on in London is the separate estate of those two partners. It is insisted that the bills in their hands remained in the same state, subject to the same rules of law and equity, as would have applied to them in the possession of the house at Liverpool; and that, having been appropriated (as it is called) or delivered to the house at Liverpool for a special purpose, and not having been ultimately applied to that purpose, and remaining in specie in their possession, Bolton would have been entitled to demand to have them delivered up to him by the banking-house at Liverpool, or by the assignees of that house, supposing them to have come to the hands of those assignees. I take it to be now settled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up subject only to the lien which the banker may have upon them for the balance of his account. On the other hand, it is clear, that, if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person. The present seems to be a middle case, and, I believe, is a new one. We must endeavor to ascertain to which class it belongs.

There can be no doubt that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate, engaged in some joint concern, in which the general partnership is not interested; and that they may, by their acts, convert the joint property of the general partnership into the separate property of an individual partner, or into the

[1] The statement of facts has been condensed.

joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects, therefore, an individual partner, or a particular partnership consisting of two or more of those persons, who are partners in some larger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with their correspondent. On the other hand, it will be difficult, if not impossible, for individual partners, or for particular partnerships composed of individual partners, to shake off privity in all transactions of the general partnership, or to avoid all the consequences of privity. Each partner is a party, as well as privy, to the transactions of the general partnership, though the general partnership is not a party to the separate transactions of the individual partners. Forbes and Gregory were therefore parties to the agreement which Caldwell and Smith entered into with Bolton, and were as much bound by it as Caldwell and Smith were. And I hold that if Bolton had sued the house at Liverpool for a breach of that agreement, and had recovered, he might have taken any part of the separate estate of the house in London in execution in satisfaction of his judgment. But this will not touch the question, what shall be deemed the joint property, and what the separate property of persons so circumstanced. Joint or several, Bolton's claim upon it in the case supposed would be equally available to him.

Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice Heath suggested this consideration at the close of the first argument. It is a very important consideration.

If all become bankrupts, all the joint and all the separate property will rest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience which has been adopted, restrains the separate creditor from resorting in the first instance to his debtor's share of the joint property; and also restrains the joint credi-

tor from resorting in the first instance to the separate property of his debtor. Bankruptcy has been called a statute execution; but if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the chancellor, who is to take order for the distribution of the effects of a bankrupt. Under the rule the separate creditors have a right to be satisfied for their debts out of the separate property in preference to the joint creditors. But what shall be deemed separate property, or what effect the claims of third persons upon that which (as between one partner and the partnership) would be separate property, are questions which neither bankruptcy nor the rule of distribution seem to touch. The assignees stand but in the place of the bankrupts, and take the effects, subject to every legal and equitable claim upon those effects. And therefore I conclude that, though bankruptcy very much alters the situation in which I have placed Mr. Bolton, in the course of the argument, as a creditor having obtained a judgment against the banking-house at Liverpool on the ground of this agreement, the question now made between him and the assignees of Forbes and Gregory remains undecided, and must (as it appears to me) depend on inquiry into the effect of the privity and participation of Forbes and Gregory in the transaction between Bolton and the banking-house at Liverpool, in which they were partners.

The true nature of that transaction has been warmly disputed in the course of the argument; but it comes out to be simply this: Bolton paid into his banker's hands these bills on his general account for a particular purpose. This has been called an appropriation; and legal consequences are deduced from thence, as if appropriation was a technical term, or at least was used in some definite or precise sense; whereas no term in popular use can be more general, or more uncertain in its import. In truth, when I say, these bills were paid in on a general account for a particular purpose, I mean only to say, that the object which the parties had in their view was, that the bankers might be enabled to provide for the payment of Mr. Bolton's acceptances in London. So far from being appropriated to any particular purpose in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. Bolton's credit with his bankers; and in the nature of things they could not be applied in specie to the particular purpose of paying Mr. Bolton's acceptances in London. These bills, at least the bills in question, were remitted to the house in London on the general account of the banking-houses. We cannot think that this was a misapplication; or that the confidence of Mr. Bolton was abused. It may be asked, assuming that Mr. Bolton considered both houses to be in full credit, was it not the very thing he meant? was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. Bolton's acceptances at the house of Forbes and Gregory? Then what effect can the privity and participation of Forbes

and Gregory in the agreement between Bolton and the banking-house have on this transaction? which, as between the two houses, undoubtedly changed the property in these bills, — a circumstance which distinguishes this case from all the cases which have been determined on this subject, and puts it out of the reach of the principle upon which the case of Zink *v.* Walker, and the late case of Took *v.* Hollingworth, in the Court of Error were determined. The privity of Forbes and Gregory to the transaction at Liverpool rather created a demand upon them to do what they did, than to take any other course: for there is no pretence to say that it was intended that a separate account of these bills should be kept by anybody. The business went on in the general channel upon the foot of the agreement, without the least imputation upon it, up to the moment of the bankruptcy, when the adverse rights of the creditors of the two houses attached.

If up to the moment of the bankruptcy nothing affected the right of Forbes and Gregory to hold these bills on their separate account, that right must vest in the assignees of Forbes and Gregory with nothing to affect it. The assignees of Forbes and Gregory are bound to admit that Forbes and Gregory knew that Mr. Bolton's object, and that the object of the partnership at Liverpool was, that by means of these bills the acceptances were to be provided for. But how were these bills to operate as means? They were to be dealt with as the banking-house thought fit to deal with them; to be negotiated, if they thought fit; to be discounted at Liverpool, if they pleased, or remitted to whom they pleased; and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them.

If then Forbes and Gregory were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house, why are not Forbes and Gregory to be considered as third persons with whom these bills have been negotiated? If they were to be so considered, this determines the class to which I said, in a former part of the argument, we were to endeavor to reduce this middle case between the case of original parties to the transaction and the case of third persons holding such bills as these in the ordinary course of the negotiation of bills of exchange.

A circumstance belonging to the lesser bill of £398 18*s.* 3*d.* was taken notice of in the argument; namely, that it came to the hands of Forbes and Gregory on the day when they became bankrupt. We are of opinion that the bill having been remitted, as far as concerned the house remitting, before the bankruptcy, and to a creditor, cannot be recalled, and must follow the fortune of the other bill.

It is a great misfortune to Mr. Bolton to have been so deeply concerned with these failing houses. In such cases it too often happens that heavy losses fall somewhere. The only consolation is that it is

the law of the land, and not the caprice or even error of any man, which can ultimately decide where they shall fall.

Our opinion upon this case is, that the judgment must be for the defendants.

Judgment for the defendants.[1]

Ex parte RUFFIN.

6 Vesey, 119. 1801.

In June, 1797, Thomas Cooper, of Epsom, brewer, took James Cooper into partnership. That partnership was dissolved by articles dated the 3d of November, 1798, under which the buildings, premises, stock in trade, debts, and effects were assigned to James Cooper, by Thomas Cooper, who retired from the trade. Upon the 2d of April, 1800, a commission of bankruptcy issued against James Cooper, under which the joint creditors attempted to prove their debts, but the commissioners refused to permit them; upon which a petition was presented to Lord Rosslyn, who made an order that the joint creditors should be at liberty to prove, with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts, and of the separate estate to the separate debts. At a meeting for the purpose of declaring a dividend, the commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in consequence of which, this petition was presented, praying that the partnership effects remaining in specie, and possessed by the assignees, may be sold, and that the outstanding debts may be accounted joint estate.

By the articles of dissolution, the parties covenanted to abide by a valuation to be made of the partnership property; and James Cooper covenanted to pay the partnership debts then due, and to indemnify Thomas Cooper against them; and Thomas Cooper covenanted not to carry on the trade of a brewer for twenty years within twenty miles of Epsom. A bond for £3,000, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and

[1] In Bonwit v. Heyman, 43 Neb. 537; 61 N. W. 716 (1895), the firm of E. Heyman & Co., composed of E. Heyman, A. Deiches, & P. J. Bonwit, was indebted to the firm of Heyman & Deiches, composed of E. Heyman & A. Deiches, in the sum of $8,200, for merchandise sold by the latter to the former firm. The firm of Heyman & Deiches was indebted to Amy Hoffman for money loaned in the sum of more than $21,000. The latter firm assigned its claim against the former to Amy Hoffman, and E. Heyman executed and delivered to her a chattel mortgage in the name of E. Heyman & Co., on the stock of that firm. Bonwit refused to allow the mortgagee to take possession of the stock, and brought an action to have a receiver of the firm of E. Heyman & Co. appointed, who should apply the assets of that firm among its creditors. In this action the mortgage of Amy Hoffman was declared to be void as against the general creditors of E. Heyman & Co.

his father, as surety. In pursuance of the covenant, the partnership property, consisting of leases, the premises where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at £2,030, after charging all the partnership debts then due. James Cooper, by his affidavit, stated that all the joint creditors knew of the dissolution and the assignment of the property; that advertisements were published; and the deponent, after the dissolution, received many debts due to the partnership, but paid more on account of the partnership. His father, by affidavit, stated that he paid the interest of the bond regularly, and intended to pay the principal when due.

Mr. Romilly and *Mr. Cullen*, for the joint creditors, and *Mr. Bell*, for Thomas Cooper.

Mr. Mansfield and *Mr. Cooke*, for the assignees.

Eldon, L. C. This case is admitted, unless *Ex parte* Burnaby, 1 Cooke's Bank. Law (4th ed.), 253, applies to it, to be new in its circumstances. Therefore, if I was of opinion that the petition could be supported, I should be very unwilling to express that in bankruptcy, where my opinion would not be subject to review. If the case I have mentioned has decided the point, there is the authority of Lord Hardwicke upon it, which would weigh down the most considerable doubt that I could be disposed to entertain. I feel great difficulty in complying with the prayer of the petition; and, when I read it, was struck with it as a new case, and as one upon which I do not clearly see my way to the relief prayed. It is the case of two partners who owed several joint debts, and had joint effects. Under these circumstances, their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had the power of suing, and by process creating a demand that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint: his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true that the separate creditors of each, by bringing actions, might acquire a certain interest even in the partnership effects, taking them in execution in the way in which separate creditors can affect such property. But there was no lien in either.

The partnership might dissolve in various ways. First, by death; secondly, by the act of the parties, that act extending to nothing more than mere dissolution, without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the others. The partnership might also be dissolved by the bankruptcy of one or of both, and by effluxion of time. If it dissolved by death, referring to the law of merchants and the well-known doctrine of this court, the death being the act of God, the legal title in some respects, in all the equitable title, would remain notwithstanding the survivorship; and the execu-

tor would have a right to insist that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right, supposing both remained solvent. So, upon the bankruptcy of one of them, there would be an equity to say the assignees stand in the place of the bankrupt, and can take no more than he could, and, consequently, nothing, until the partnership debts are paid. So, upon a mere dissolution without a special agreement, or a dissolution by effluxion of time, to wind up the accounts, the debts must be paid, and the surplus be distributed in proportion to the different interests. In all these ways, the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves. When the bankruptcy of both takes place, it puts an end to the partnership certainly; but still it is very possible, and it often happens in fact, that the partners may have different interests in the surplus, and out of that a necessity arises that the partnership debts must be paid; otherwise the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions or equally. Many cases have occurred upon the distribution between the separate and joint estates, and the principle in all of them, from the great case of Mr. Fordyce, has been that, if the court should say that what has ever been joint or separate property shall always remain so, the consequence would be, that no partnership could ever arrange their affairs. Therefore, a *bona fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors; and therefore the court always let the arrangements be as they stand, not at the time of the commission, but of the act of bankruptcy.

Thomas Cooper is admitted to be solvent. He certainly has no such equity, as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance, not his own act. But he dissolves the partnership a year and a half ago, and, instead of calling upon these effects according to his equity at the dissolution, to pay the partnership debts, he assigns his interest to the other, to deal as he thinks fit with the property, to act with the world respecting it, desiring only a bond to pay a given value in three or four years. Therefore he or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he has no equity. It is then said, and the circumstance had struck me, that all the property is not assignable at law, — for instance, the debts, — but, as between the two Coopers they were the property of the bankrupt; for debts are within the statute of King James, and, if left in the order and disposal of the bankrupt, he is proprietor of the debt. Therefore, Thomas Cooper could never set up the insufficiency of the legal operation of the assignment against his own deed. The assignment was not made subject to the payment of the debts, but in consideration of a covenant,

leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts. The creditors, therefore, cannot rest upon the equity of the partner going out. I was struck with the argument of inconvenience; the inconvenience on all sides is great. To say this seems to me a monstrous proposition; that which, at any time during the partnership, has been part of the partnership effects, shall in all future time remain part of the partnership effects, notwithstanding a *bona fide* act. Suppose, an improbable case, that the partners in Child's house chose to shift their shop from Temple Bar to the west end of the town; and that house, now the property of the partnership, was *bona fide* bought by one of the partners, and the money was invested in the purchase of the new house in which they were going to reside; suppose, a still more improbable case, that a year and a half or ten years afterwards they became bankrupt, — would that house be part of the partnership effects? It would be so, if it remained without the legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution; but where the effect is a *bona fide* transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor, who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenience to examine the *bona fides* of each transaction than to say such transactions shall never take place.

The case of West *v.* Skip, 1 Ves. 237, falls within some of the observations I have made. Heath *v.* Percival, 1 P. Wms. 682, does not apply at all. The bond in that case was not given up; and, therefore, the creditor keeping the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. Hankey *v.* Garratt, 1 Ves. 236, is also very different. There the partnership was dissolved by bankruptcy or by death, and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon Burnaby's Case. I do not know how to understand it. Whether there was anything special in the assignment, I cannot find out from the report. I shall endeavor to find the papers. It looks very like this case; if it is in specie this case, as an authority, I should think myself bound to submit to it. But if it is not in specie this case, there is so much doubt whether this relief can be given, that I am satisfied it ought to be given, if at all, in a jurisdiction where my opinion would be subject to review. My present inclination is that the creditors have not this equity. I have considerable doubt, also, whether, if they have it, Thomas Cooper would be benefited by it; and a further subject of grave and serious doubt is, whether, if the joint creditors disturb the arrangement, the separate creditors would not have a right to set the arrangement right at his expense.

I now think there is a circumstance which distinguishes Burnaby's

Case. The assignment was not by one to the other two, but by one to one of the other two, which may be very different. I think that circumstance distinguishes the case so much that I shall consult the interest of the parties better by saying they may file a bill, if they think proper, than by further delay.

The petition was dismissed.

In re KEMPTNER.

L. R. 8 Eq. 286. 1869.

In February, 1867, W. Kemptner, a partner in the firm of W. Kemptner & Co., merchants, of Yokohama, in Japan, being about to go to England, desired to withdraw from the funds of the partnership £4,000, which was standing to his credit in the partnership books, and which, under the articles, he was entitled to withdraw at any time. Accordingly, bills of exchange for £4,000, drawn by banks in Japan on banks in London, and payable to the order of W. Kemptner & Co., were purchased with partnership moneys. The bills were in three sets. The first set were indorsed by the firm to W. Kemptner, and were handed to him; the second set were sent to London in an envelope, addressed to W. Kemptner, but were not indorsed. W. Kemptner died at New York, in May, 1867, on his journey to England, and the first set of bills were lost. In December, 1867, the surviving partners assigned their estate and effects to trustees, to be administered, as in bankruptcy, for the benefit of their creditors. The bills being claimed on the one hand by the executors of W. Kemptner as his separate estate, and on the other hand by the trustees of the creditors' deed as partnership assets, by arrangement the second set were indorsed by Malcolm, one of the partners, who was in England, in the name of the firm; and the money was received by two stakeholders, who paid it into court under the Trustee Relief Act.

A petition was now presented by the executors, for the payment of the fund in court to them.

Malcolm, one of the surviving partners, in an affidavit in support of the petition, attributed the insolvency of the firm to the failure of speculative transactions into which the firm had entered before February, 1867, but which had not then resulted in a loss; but, from his cross-examination, and other evidence, the court was satisfied that the firm was in fact insolvent when the bills were purchased.

Mr. Lindley, for the petitioners.

Mr. Locock Webb, for the trustees, was not called upon.

Mr. Stirling, for the stakeholders.

Sir R. Malins, V. C. It is admitted by Mr. Lindley that, if the transaction was a fraud, the petitioners can have no right to receive

the money. Now, was it a fraud or was it not? I should be very slow to come to the conclusion that Mr. Kemptner, who died more than two years ago, intended to commit a fraud; but I must look at the transactions, and the position of the parties when they took place. That this firm was insolvent to the extent of very many thousands of pounds, at the very time, I cannot entertain the slightest doubt. [His Honor referred to the evidence, and continued:] Even if it rested upon that, I should be bound, I think, to come to the conclusion that, this being a fact well known in the month of August or September, 1866, and these bills having been purchased in February, 1867, it was intentionally done, whether fraudulently intended or not makes no difference. But over and above all that, there is the fact that, at the end of the very same year in which the transaction took place, which could only be justified on the assumption of the solvency of the firm, the firm was insolvent. How were they insolvent? Was the failure caused by any new undertaking, any unforeseen misfortune? On the contrary, Mr. Malcolm, in his cross-examination, admits that the whole of the losses arose from the transactions which had been entered into, and the liabilities, therefore, to such losses had been incurred, before the transaction now in question. Upon what principle can a partner who has concurred with his co-partners in entering into mercantile adventures which may end, as they did in this case, in ruinous losses, be entitled to treat his firm as solvent? Until the result of the undertakings is known, he cannot be justified in taking out the whole of his capital upon the assumption that the firm is solvent, which, if he did not know, I must take him as bound to know, to have been insolvent. In such a case, if any accident has prevented the partner from possessing himself of the assets of the creditors, the court is bound to exercise all its power to prevent a transaction so grossly improper as this is. I come to the conclusion that, even if it had not been for the contingent liabilities, the firm was, to the knowledge of Mr. Kemptner and all the other partners, in February, 1867, when this transaction took place, insolvent. If the money had been taken out, the creditors could only have resorted to such estate as they could find; but it happens that the transaction was not completed, the bills were not paid, and I think the creditors have a right to follow the bills in any way they can. It happens that they have been able to follow them in consequence of the indorsement not having taken place; and I must treat Mr. Kemptner as not having received the money. The court has possession of it, and, having possession of it, it is my duty to say it is not to go to the separate creditors; in other words, it is not to go to Mr. Kemptner, but is to remain as part of the assets of the firm of which he was a member.

As to the costs, I think it is a very proper case to have been brought here; and it would have been impossible for the trustees to have dealt with the matter without coming to the court. It has reasonably been conceded that the costs of both parties should be paid out of the estate, and what remains must be handed over to the trustees of the deed.

WIGGINS *v.* BLACKSHEAR ET AL.

86 Tex. 670: 26 S. W. 939. 1894.

STAYTON, C. J. This is an action by W. N. Wiggins against the persons composing the firm of Blackshear & Co., and P. C. Baird, sheriff, to recover the value of property seized by the latter under attachment sued out by Blackshear & Co. in an action brought by them against J. T. Wiggins & Co., a firm composed of J. T. Wiggins and S. J. Redman. J. T. Wiggins & Co. owned a stock of drugs, paints, oils, etc., of the value of $1,310, besides accounts and claims amounting to $800. J. T. Wiggins was indebted to W. N. Wiggins in the sum of $445, exclusive of some interest, and S. J. Redman was indebted to F. W. Henderson in the sum of $594. These were not partnership debts, but the money for which they were contracted seems to have been used in the partnership business. The firm was indebted in the sum of $871.63, of which $292.71 was due to Blackshear & Co. On December 24, 1889, Wiggins & Co. were unable to raise money to meet their maturing indebtedness, and in that sense the firm was insolvent, but it does not appear what property the members of the firm owned at that time. On that day they conveyed to W. N. Wiggins, in trust, all of the partnership property, with power to sell it, collect the debts, and, after paying the expenses, to pay (1) the sums due from J. T. Wiggins to W. N. Wiggins, and the sum due from Redman to Henderson; (2) the sums due to partnership creditors in full or *pro rata,* without preferences between them, — any property remaining after these things were done to be returned to J. T. Wiggins & Co. Before the trust deed was executed, and with view to make them partnership creditors, the notes due from J. T. Wiggins to W. N. Wiggins, and from S. J. Redman to Henderson were indorsed by the firm of J. T. Wiggins & Co., with knowledge of these creditors. W. N. Wiggins took possession of the property at once, in accordance with the trust deed, whereupon Blackshear & Co. brought suit for the sums due them, and seized the property under attachment, and it was afterwards sold as perishable property. That seizure was the basis of this action, and the question arises whether Wiggins & Co. could thus, by way of mortgage, appropriate their partnership property to payment of individual debts of members of the firm. In the decision of this question, the fact that the money borrowed by the persons composing the firm, for which they were only severally liable, may have been used in the purchase of property that became the property of the firm, may and will be considered only in so far as it shows that the mortgage given to secure sums so borrowed and used was made without fraudulent intent. That the individual debts so secured were real, and the money obtained through their creation used in the the purchase of property which became partnership property, takes from the case all question of fraud, and leaves the simple question whether the members of a partner-

ship, circumstanced as was the firm of Wiggins & Co., may lawfully mortgage partnership property to secure debts of the several members of the firm, for which the partnership is not liable.

There are two theories on which it is sometimes claimed that creditors of a partnership have a right to have its assets applied to the payment of their claims in preference to creditors of the persons composing the firm. The first of these is that the partnership property is presumed to have been obtained through credits given to the firm, and that, for this reason, partnership creditors ought to be preferred in the distribution of its assets. But, if courts could enter into such inquiries, the facts of this case would defeat the right to preference on such a ground, for the partnership property in question was doubtless largely acquired with money borrowed by the several persons composing the firm from W. N. Wiggins and F. W. Henderson, to whom preference was given in the mortgage.

The other theory is that a partnership ought to be treated as a person, in contradistinction to the persons composing it, and therefore its property ought to be first subject to the payment of partnership debts, without reference to the will of the partners; but a partnership cannot be so considered, simply because such is not its nature. For partnership debts the members of the firm are jointly and severally liable, and the law recognizes no personality in a partnership other than that of the persons who compose it. As every partner is liable for the debts of his firm, and owns its property in common with other partners, it is his right to have the common property applied to the payment of partnership debts, and all the other partners, without his consent, cannot take this right from him.

This right is sometimes said to give every partner an equitable lien on firm assets, as well to secure him against several liability for firm debts as to secure to him his proper share of the firm assets on dissolution; but creditors of a partnership have no lien or other claim on partnership assets which can prevent the members of the firm from disposing of those in any manner or to whomsoever they may deem proper, provided that such disposition is not fraudulent. That a partnership creditor has no specific lien, either legal or equitable, upon partnership assets, any more than any individual creditor has upon the estate of his debtor, is so firmly established that citation of authority in support of the proposition is useless; but they may acquire liens by contract, or through the process of a court by which the creditors may acquire liens on specific property. The rule is thus well stated: "A creditor of a partnership has, as a general rule, no direct lien upon the partnership property until he acquires it by legal process, that is, by the levy of an attachment or of an execution. His indirect or *quasi* lien is derived from the lien or equity of the individual partners. It is practically a subrogation to the lien of the individual partners. If the partners are not themselves in a condition to enforce an equitable lien upon the partnership property, the creditors of the

partnership cannot enforce a lien derived from them or from one of them. The equity of the partnership creditor continues so long as the equity of the individual partner continues, and no longer." Jones, Liens, 788.

When, however, the property of a partnership passes into the custody of a court for administration, as in cases of bankruptcy or assignment made by an insolvent firm, then the court will administer it as was the right of the several partners to have it administered while controlled by themselves. In such cases, the court's action is based as fully upon the rights of the partners as between themselves as upon the rights of creditors; and, when the result of the proceeding is to discharge partners from further liability, then the first theory before referred to may have been given weight in establishing an administrative rule in such cases. In accordance with the general rule before stated, it has been steadily held that one partner may in good faith convey his interest in partnership assets to another, and that thereby all equities of such partner and of all partnership creditors to subject such assets first to the payment of their claims is thereby lost. White *v.* Parrish, 20 Tex. 689; Rogers *v.* Nichols, Id. 719; Weaver *v.* Ashcroft, 50 Tex. 442; Swearingen *v.* Bassett, 65 Tex. 272; Stansell *v.* Fleming, 81 Tex. 298.

It has been held that one member of an insolvent partnership, all the members being insolvent, may transfer in good faith with the concurrence of the other partners, his interest in the partnership property to an individual creditor, and that, after this, a simple contract creditor cannot maintain a bill to subject the property to payment of a debt due to him by the firm. Case *v.* Beauregard, 99 U. S. 119.

As priority of right of partnership creditors over creditors of the individual members of the firm rests on the rights of the partners themselves, can there be any doubt if an insolvent partnership be dissolved by mutual agreement of its members, and its property be divided between them in accordance with their several interests, that partnership creditors would lose all right to priority of payment out of property so distributed? Members of a partnership having thus voluntarily surrendered their rights so as to have the assets appropriated, each would hold property received in distribution in his separate right, subject alike, however, to the claims of all creditors, both individual and partnership. Such a transaction would not be fraudulent as to either class of creditors, unless some further fact intervened, for the property in the hands of each partner would be subject as before to the claims of partnership creditors as well as others.

In the case before us, the inference is that the members of the firm of Wiggins & Co. owned equal shares in the partnership property; and if they had conveyed or mortgaged the entire property to pay or secure the debt of one of the partners, for which neither the firm nor the other partner was liable, then, on the plainest principles of right, it ought to be held that such a conveyance or mortgage was fraudulent as to

firm creditors, and as to creditors of the member of the firm not bound for the debt, for, to the extent of his interest in the property, the conveyance would be voluntary. Such, however, is not the case we have before us. The value of the firm assets, exclusive of accounts and claims, which amounted to $800, was shown to be $1,310, and one-half of this was more than the individual indebtedness of either partner secured by the mortgage. As partnership creditors had no lien on firm property, no reason is perceived why each member might not lawfully permit the other to pay his individual debt out of his own share of the partnership property; and the same reasons which would make lawful such a payment would give validity to a mortgage given by both partners to secure debts of members of the firm. Conveyances or mortgages given under such circumstances and for such purposes are not voluntary and therefore fraudulent as to partnership creditors.

If the sums each partner owed individually had been equal, no one would doubt their perfect right, under agreement between themselves, to pay or secure their several debts with partnership assets, for this would be simply using by each one what belonged to him for a lawful purpose. That their several debts were not exactly equal is a matter of no importance in view of the fact that the share of each in firm assets exceeded in value the individual debt of each secured by the mortgage. The rule applicable to partnership property and creditors when in the hands of a surviving partner, or when in course of administration in bankruptcy, or under assignment for benefit of creditors, was applied in the District Court and in the Court of Civil Appeals, but it is believed to be inapplicable in cases like this, in which, although the firm be insolvent, partners by mutual agreement may, within the limit heretofore noticed, prefer individual creditors, if this be done in good faith.

This cause was tried without a jury, and, under the findings of the Court of Civil Appeals, judgment will be here rendered in favor of the plaintiff against all defendants for the sum of $1,310, with interest thereon from January 2, 1890, at rate of 8 per cent per annum, together with all costs incurred in this litigation.

It is so ordered.

JACKSON BANK *v.* DURFEY ET AL.

72 Miss. 971 : 18 So. 456. 1895.

Cooper, C. J. The appellant, a firm creditor of the appellees, Durfey & Ascher, exhibited its bill in chancery, seeking to annul as fraudulent two certain deeds of trust whereby the firm assets were incumbered to secure the individual debts of the partners. The evidence, fairly construed, discloses these facts: Durfey, one of the partners, was indebted to the defendant Caldwell in the sum of $5,000, and

Ascher, the other partner, was indebted to Hart in the sum of $5,550. The firm and the individuals composing it were insolvent. On October 3d, Durfey executed a deed of trust on all property owned by him individually, and upon his individual half interest in certain property, specifically described, owned by the firm, to secure the debt due by him to Caldwell. On the same day Ascher executed a deed of trust conveying his individual property, and his individual half interest in certain property, specifically described, owned by the firm, to secure the debt due by him to Hart. The book accounts, and certain horses which had been bought for resale, were not included in the conveyance; but the stock kept in livery, the carriages, feed, and other appurtenances, were all incumbered. Forfeiture of both conveyances was fixed for the same debt, — January 1st, following, — at which time, the secured debts remaining unpaid, the trustees were authorized and directed to make sale of the mortgaged property, and out of its proceeds to pay the secured debts. The members of the firm testified that they expected, by the collection of the outstanding book accounts, by the sale of the stock not included in the deeds, and from the profits of the business, to pay the firm debts; but a careful consideration of the evidence satisfies us that at the time the deeds were executed the firm and its members were hopelessly insolvent, and that no expectation could reasonably have been entertained that the firm debts could be paid after the firm property had been devoted to the individual debts of the partners. What followed the execution of the deeds was at best the struggle of men hoping against hope, and postponing for a short time the inevitable end. The issue is thus sharply presented whether it is lawful for the members of an insolvent firm to devote the joint estate to the individual debts of its members, leaving the firm debts unpaid. The question has never, so far as we are advised, been before the court, though expressions may be found, suggestive of the inclination of some of the judges who have been members of the court, that the dominion of the partners over firm property is not limited by the existence of firm debts and the insolvency of the firm.

In Schmidlapp *v.* Currie, 55 Miss. 597, — a case of a solvent firm, — Judge Chalmers, while carefully limiting the decision to the question involved (i. e., the right of a solvent firm to devote firm assets to the payment of the debts of one of the members), cites with apparent approval the cases of Rice *v.* Barnard, 20 Vt. 479; Bank *v.* Sprague, 20 N. J. Eq. 14; Allen *v.* Center Valley Co., 21 Conn. 130; and Sigler *v.* Bank, 8 Ohio St. 511, — which clearly hold that an insolvent firm may devote firm assets to the debts of its individual members; and also Whitton *v.* Smith, Freem. Ch. (Miss.) 231; Freeman *v.* Stewart, 41 Miss. 139; Carter *v.* Beaman, 6 Jones (N. C.), 44; *Ex parte* Ruffin, 6 Ves. 119; and Campbell *v.* Mullett, 2 Swans. Ch. 553,— which are sometimes cited as supporting the same view. In Bank *v.* Klein, 64 Miss. 141, it was sought by the creditors of a banking firm to subject to their demands the proceeds of certain life policies upon the life of

one of the members in favor of his wife, the premiums on which the bill averred had been paid with firm money, while the bank was insolvent. The answer denied the insolvency of the firm at the time the premiums were paid, and there was no evidence on the point. The case was decided on this point. Judge Arnold, however, in delivering the opinion of the court, gave expression to an emphatic dictum, that the insolvency of the firm and its members would not have changed the result. In addition to the cases cited by Judge Chalmers in Schmidlapp *v.* Currie, he referred to the cases of Case *v.* Beauregard, 99 U. S. 119, and Rooch *v.* Brannen, 57 Miss. 490.

In neither Whitton *v.* Smith, Freem. Ch.; Freeman *v.* Stewart, 41 Miss.; Rooch *v.* Brannen, 57 Miss.; Schmidlapp *v.* Currie, 55 Miss.; nor Bank *v.* Klein, 64 Miss., — was the question now involved presented for decision. In all of these the nature of the rights of partnership creditors to resort to firm assets for the satisfaction of their demands was considered, and the decisions in the cases in which the point was involved show that the right, being a derivative one, and resting on the rights of the partners, had been lost by the waiver of the partners, under the circumstances of the particular cases. The question involved is *res nova* in this State, and we deal with it as such. The authorities, with practical uniformity, agree that the right of partnership creditors to have the partnership property applied to the payment of partnership debts is a derivative one, resting upon the equities of the partners as between each other. The conflict of decision arises with the question whether the partners may, by convention, waive their rights, and convert the joint estate into severalty, thus subjecting it to the debts of the individual members, or, by direct appropriation, apply the joint estate to such debts. It is quite generally held that this may be done so long as the partnership is solvent, and a going concern. Some courts seem to hold that if the partnership, though insolvent, is yet engaged in the prosecution of its business, it may thus deal with the partnership estate; and others, that this may be done even though the partnership is insolvent, contemplates dissolution, and converts the joint into separate estates for the purpose of applying it to the individual debts of its members. In Case *v.* Beauregard, 99 U. S. 119, the insolvent members of an insolvent firm had applied all the partnership property to the payment of their respective individual debts. The firm creditors sought to subject it to their demands, but relief was denied upon the ground that the right of firm creditors was a derivative one, and could not be enforced except so long as the partners themselves retained their liens upon the property. Speaking on the precise point, the court said: "The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other

partners, if a fraud at all, rather than upon the joint creditors; a fraud which those partners could waive, and which was subsequently waived by the act of fusion." The clear effect of this decision is that it is not a fraud upon partnership creditors for an insolvent firm to devote the joint estate to the payment of the separate debts of the partners, leaving no provision for the firm creditors.

In no other case we have seen has the question been presented where the conversion of the whole assets into separate estates or the devotion of all of them to individual debts was involved. The reasoning of other courts, however, in the following cases, would seem to conduct to the same conclusion as that reached in Case *v.* Beauregard. Sigler *v.* Bank, 8 Ohio St. 511; Rice *v.* Barnard, 20 Vt. 479; Allen *v.* Center Valley Co., 21 Conn. 130; Winslow *v.* Wallow, 116 Ind. 324; Purple *v.* Farrington, (Ind.) 4 L. R. A. 535; Fletcher *v.* Sharpe, (Ind.) 1 L. R. A. 179. See also other cases, probably holding to the same effect, cited in notes to § 560, 1 Bates, Partn.

But the decided weight of authority is that, while the right of firm creditors to go against the firm property in postponement of the right of creditors of the individual members is a derivative right, and rests on the right of the members of the firm, and while that right is lost by the *bona fide* waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property, and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty. to prevent its being seized by firm creditors. *Ex parte* Mayou, 4 De Gex, J. & S. 664; *Ex parte* Snowball, 7 Ch. App. Cas. 534; Cron *v.* Cron's Estate, 56 Mich. 8; Cribb *v.* Morse, 77 Wis. 322; Willis *v.* Bremmer, 60 Wis. 622; Menagh *v.* Whitwell, 52 N. Y. 146; Phelps *v.* McNeely, 66 Mo. 554; Reyburn *v.* Mitchell, 106 Mo. 365; Roop *v.* Herron, 15 Neb. 73; Arnold *v.* Hagerman, 45 N. J. Eq. 186; Darby *v.* Gilligan, 33 W. Va. 246; Shackelford *v.* Shackelford, 32 Grat. 503; Bank *v.* Sprague, 21 N. J. Eq. 530; French *v.* Lovejoy, 12 N. H. 458; Flack *v.* Charron, 29 Md. 311; Clements *v.* Jessup, 36 N. J. Eq. 569; Elliott *v.* Stevens, 38 N. H. 311; Gallagher's Appeal, 114 Pa. St. 353; Patterson *v.* Seaton, 70 Iowa, 689; Pars. Prin. Partn. § 106; Bates, Partn. § 563; Jones, Mortg. § 120; Beach, Mod. Eq. §§ 787, 788; Hare & W. note to Silk *v.* Prime, 2 Cas. Eq. pt. 1, 353. The principle controlling in these cases is stated with precision by Judge Dixon, delivering the opinion of the court in Arnold *v.* Hagerman, 45 N. J. Eq. 186. We quote from that opinion at large, as we adopt and affirm the reasoning of the court: "In equity, a partnership is for some purposes deemed a single entity. Thus, when partnership property invested in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and it is used first to liquidate the debts, and only the surplus, if any, is surrendered to the individual partners.

This equitable practice rests upon the presumed intentions of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in *Ex parte* Ruffin, 6 Ves. 119, it has been generally held that the partners could put an end to their right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their members, or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct." "Growing out of this right of partners, has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally, it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which it is ordinarily attached. In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is ordinarily but a right, by lawful procedure, to acquire a lien during the ownership of the debtor. Yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has aliened his property, with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of *bona fide* purchasers, for good consideration, without notice." "Equity applies this statute to a partnership, its property and creditors, just as it would in the case of an individual; and therefore, while it is generally true that a partnership may defeat the equity of its creditors by the alienation of its property, and subsequent extinguishment of the right of its partners *inter sese*, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects."

In Clements *v.* Jessup, 36 N. J. Eq. 569, it was said: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all of the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts." The recognition of this equity in favor of firm creditors does not impair any proper exercise of the power of the partnership over its property or affairs, nor bring within the control of a court of equity all partnerships which are insolvent in fact, or in a condition of temporary inability to meet their obligations. The apprehension of this result seems to have been influ-

ential in leading the court, in Sigler *v.* Bank, 8 Ohio St. 511, to adopt the opposing view. But the statute against fraudulent conveyances does not operate to control the lawful dominion of individuals, though insolvent, over their property; nor does mere insolvency confer jurisdiction upon equity to take charge of and administer their estates. And yet it cannot be denied that the statute does restrain the insolvent from disposing of his estate for the purpose of withdrawing it from liability to his creditors. Why should a different rule be applied to an aggregation of individuals than to them separately? The inquiry must in either case be whether the purpose and effect of the act is lawful, and it may be done by the individual or by a firm; if unlawful, the act is equally void, as to the creditors injured, whether it be done by the one or the other.

But it is again said that it cannot be a fraud for one to devote whatever right of property he has to the payment of an honest debt. This is true if one devotes his own property to his own debts; but is it not a fraud in law if A. appropriates his property to pay B.'s debt, leaving his own unpaid? Take the case at bar. Durfey & Ascher appropriated one-half of their joint estate to pay Ascher's debt. Now, if this was all that had been done, it would be manifest that the creditors of Durfey could treat the conveyance as fraudulent, because it would have been a clear donation by Durfey to the creditors of Ascher, at the expense of his creditors, he being insolvent. But it is said that Ascher at the same time conveyed his interest in the other half of the joint estate to the creditors of Durfey, and so each conveyance became a consideration of the other, and each partner received a full consideration for his release of his right as a partner. The reply is that a full consideration does not make a contract, otherwise unlawful, valid. If A. agrees to do one unlawful act if B. will do another, of what avail is it that each will reap a benefit from such an act of the other? Durfey had a right to have the partnership property applied to the partnership debts, and Ascher had a like right. While these reciprocal rights existed, they were of value as property rights of the debtors to a certain class of creditors,— i. e., firm creditors. Now, it is manifest that for the very satisfaction of their demands the rights themselves were waived, and attempted to be obliterated. We are unable to perceive any just principle upon which the right of a debtor can be recognized to thus deal with his estate for the very purpose of obstructing his creditors.

It is to be noted, also, that neither partner could make a cent by the transaction. Five thousand dollars' worth of property will pay only $5,000 of debts, whether its proceeds be applied to partnership or individual liabilities. The partners would, in either event, after the payment of debts of either class, owe precisely the same sums. To permit the consummation of the scheme would be of no benefit to them. Its sole effect would be to withdraw the property from one class of creditors who had created the joint estate, had given credit on the faith of it, and had a right to resort to it, and to permit its appropriation to

another class, who dealt with the individuals composing the firm, with a full knowledge that all they could get out of the partnership assets was what remained after payment of the debts. The complainant is entitled to the relief prayed by its bill.

The decree is reversed, and cause remanded.[1]

BANNISTER ET AL. v. MILLER ET AL.

54 N. J. Eq. 121:[2] 32 At. 1066. 1895.

THE bill is filed by four judgment creditors, on behalf of themselves and such other creditors as may choose to come in, against a partnership, for the purpose of setting aside, in part, a mortgage executed by the partnership. The facts are these: Edward A. Miller and Theodore S. Miller entered into a co-partnership on March 7, 1891, the partnership to continue for four years from May 1, 1891. By the terms of the articles of co-partnership, each partner agreed to contribute, as capital, the sum of $4,000. Mr. E. A. Miller, of the $4,000 which he invested, borrowed $2,800 from Catharine Barkhorn and $1,200 from Amelia B. Miller. Mr. T. S. Miller borrowed his $4,000 from John Rilly. The sum of $8,000 was deposited to the credit of the firm on April 1, 1891. On February 26, 1892, Edward A. Miller and Theodore S. Miller executed a chattel mortgage covering all the tangible, and practically all the available, property belonging to the firm. The mortgage was made to John C. Miller, as trustee, and by it the trustee was authorized

[1] In Teague *et al.* v. Lindsey *et al.*, 106 Ala. 266: 17 So. 538 (1895), the court said: "A partnership, in contemplation of law, is an entity distinct from the members who compose it; and, if the partnership is insolvent or in failing circumstances, an appropriation of the partnership property or assets to pay the separate debt of a partner is a fraud upon partnership creditors. Pritchett v. Pollock, 82 Ala. 169. The capital of a partnership is that which each partner agrees to contribute as the basis for beginning or continuing the business. 1 Bates, Partn. § 251. These contributions do not form partnership debts; and, if a member obtain them on his own credit, the fact that they pass into and enure to the benefit of the partnership does not render the partnership liable to his creditor. Id. § 446. But, when the rights of partnership creditors have not intervened, the separate debt the partner has so created, by the consent of the several partners, may be converted into a partnership debt. Id. § 515. In the original purchase of the goods from Thornton each partner created a separate debt. If the purchase was not in point of time precisely coincident with the formation of the partnership, it was made in contemplation of it, and of a partnership on a basis of equality between the partners. On the commencement of the business of the partnership, their separate debts were converted into the debts of the partnership, the partnership not then owing any other debt. The debts in the new form given them were founded on an adequate and valuable consideration, and, whatever may have been the relation of the partners separately to Thornton, they became, as to the partners, partnership debts. The instructions we are considering ignore the uncontroverted evidence showing that the separate debts to Thornton were converted into partnership debts."

[2] Affirmed in Court of Errors, 54 N. J. Eq. 701. A part of the opinion, not bearing on the law of partnership, has been omitted.

to sell the property assigned to him, and, after paying all expenses incurred in selling the property, to pay a list of creditors in an order mentioned. He was to pay John Rilly the sum of $4,000, Catharine Barkhorn, $2,800, and Amelia B. Miller, $1,200. These three were to be first paid *pro rata*. After paying these three creditors, he was to pay, consecutively, a list of creditors, the last name upon which was that of one of the complainants, Lounsbury, Matthews, & Co. This was the only one of the complainants named in the list. The trustees proceeded to sell, and realized nearly $14,000. He paid Rilly, Barkhorn, and Amelia B. Miller in full. He also paid all of the creditors named in the list in full, except Lounsbury, Matthews, & Co., the sum still remaining in the hands of the trustee being insufficient to pay to the last creditor more than the sum of $1,385.71, which payment was received by said creditor. Subsequently, four creditors of the firm commenced actions, and obtained judgments against the firm. Samuel T. Laird obtained a judgment of $3,900.95, George E. Lounsbury and others a judgment of $4,088.92, James A. Bannister a judgment of $4,345.06, and the James A. Bannister Company a judgment for $348.44. Executions were issued upon these judgments, and returned unsatisfied on February 7, 1893.

The bill charges that the first three creditors paid by the trustee were not firm creditors, but were creditors of the individual members of the firm; that, there being insufficient firm assets to pay the firm creditors, a diversion of $8,000 from the receipts of the sale of the firm property to the payment of individual creditors was a fraud upon the former class; and, inasmuch as the property of the firm cannot be traced in specie, the complainants ask that these individual creditors, who received these amounts of money, shall be decreed to repay them.

Robert H. McCarter, for complainants.

Philemon Woodruff and *F. W. Stevens*, for defendants.

REED, V. C. (after stating the facts). It is entirely clear that the first three named in the schedule of creditors, to whom money realized from the sale of the firm property was paid, were not creditors of the partnership, but were creditors of the members of the firm individually. The amounts which make up those three debts were borrowed by the respective partners upon their own credit; and although the money so borrowed constituted the capital with which the firm commenced its business, and was presumably used in the business, yet the obligation for its repayment rested entirely upon the individual by whom it was borrowed. The doctrine seems to be entirely established, to use the language of Justice Lindley, "that, if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him." Lindl. Partn. 202. The English cases in support of this rule are to be found in the notes to the text just mentioned, and the cases in the American courts holding the same doctrine are collected

by Mr. Bates in his work on Partnership, § 446. An analysis of those cases would be profitless. They all rest upon the obvious absence of any agency, express or implied, in the person borrowing to bind other persons for what is understood to be a personal transaction, entirely apart from the business of the firm. Therefore, I find that the debts in question were the debts of the two Millers respectively.

I also regard it as entirely clear that, at the time of the execution of the chattel mortgage, the firm was insolvent. It had arrived at a stage in its business when it was confronted with an array of debts which rendered its continuance practically impossible. The sale of all its property was made openly, and apparently under favorable conditions. It did not realize enough to pay the partnership debts; and, after deducting the $8,000 which was paid to the first three on the list of creditors, the deficit between the assets remaining and the partnership debts is marked. The question remains whether, in this posture of affairs, the firm possessed the ability to apply any of its assets to the payment of those three debts.

A firm can do as it pleases with its property so long as it retains enough to pay its creditors. When, however, it is so placed that any devotion of its assets to a purpose other than its own business, or the liquidation of its own debts, wrongs its own creditors, its power to so divert ceases. And the payment of the individual debt of its members is, under these conditions, a diversion of its assets. In dealing with the estate of an insolvent firm, or an insolvent member of the firm, the courts of equity in England draw a sharp line between the two classes of creditors. The joint property is devoted to the payment of the joint debts, and separate debtors are paid out of the separate estate of each partner. Lindl. Partn. 693. This principle was recognized and applied in this State by Chancellor Green, in Matlack *v.* James, 13 N. J. Eq. 126, and in the Court of Appeals by Mr. Justice Depue, in Clements *v.* Jessup, 36 N. J. Eq. 569, and Mr. Justice Dixon, in Arnold *v.* Hagerman, 45 N. J. Eq. 186.

It is, indeed, insisted by counsel for the defendants that the equity of partnership creditors in the partnership assets is a derivative one, resting upon their right to be subrogated to the right of each partner to have the joint assets applied to the liquidation of the joint liabilities; and it is argued that, as the partners have parted with their rights by the execution of this chattel mortgage, therefore the equity of the firm creditors is extinct. But, as is pointed out in the last mentioned case, the right of firm creditors to follow firm assets may subsist by force of the statute of frauds, after the ownership has passed from the firm to others. As an instance where this rule came into operation, the case of Matlack *v.* James, *supra*, was mentioned, in which case two members of a firm, consisting of four, conveyed their individual half interest in land held for partnership purposes to an outsider, to pay their individual debts. The opinion also cites with approval the language of Justice Depue in Clements *v.* Jessup, *supra:* "Partnership creditors,

in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts." I conclude, therefore, that those provisions contained in the chattel mortgage which provided for the diversion from the firm assets of a sum sufficient to pay the three individual debts already mentioned were a fraud upon the partnership creditors. The firm creditors have a footing in a court of equity to follow and reclaim such assets, so far as it is essential to the liquidation of their claims. Van Doren *v.* Stickle, 24 N. J. Eq. 331, affirmed 27 N. J. Eq. 498. . . .

I will advise a decree that the individual creditors of the members of the firm be declared to hold the property they had received from the trustee, under the chattel mortgage, in trust for the creditors of the firm; that a receiver be appointed to receive and disburse such money, and that the said Catharine Barkhorn, Amelia B. Miller, and John Rilly be decreed to pay to the receiver the moneys that they have received from the trustee under the chattel mortgage.

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§ 3. Devested by Act of One Partner.

LAMBERT'S CASE.

Godbolt, 244. 1614.

Two men were partners in goods: the one of the partners sold unto J. S., at several times, goods to the value of £100, and for the goods at one time bought he paid the money according to the time; afterwards an action was brought by one of the partners for the rest of the money, and the plaintiff declared upon one contract for the whole goods, whereas in truth they were sold upon several contracts made, and the defendant in that case would have waged his law. But the court advised the plaintiff to be non-suit, and to bring a new action, because that action was not well brought, for it ought to have been a several action upon the several contract. And in this case it was agreed by the court, that the sale of one partner is the sale of them both; and therefore although that one of them selleth the goods or merchandiseth with them, yet the action must be brought in both their names; and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods unto him, as is supposed in the declaration.

THOMPSON ET AL. v. BROWN ET AL.

Moody & Malkin, 40. 1827.

ASSUMPSIT for goods sold and delivered. Defendants were partners from January 1, 1824, to January 1, 1825. Before the partnership, Brown was indebted to the plaintiffs in the sum of £64, and during the partnership it became indebted to plaintiffs to the amount of £210. Early in 1824, Brown paid to plaintiffs a check for £60, and after the dissolution £150 was paid by Weston. It was doubtful on the evidence whether the check for £60 belonged to the firm or to Brown; and it was contended for the plaintiffs that the payment having been made without any appropriation, the plaintiffs were at liberty to apply it to the first items in the account, and in that case the defendants, as partners, would still be liable for the balance of the partnership debt.

Scarlett & Chilton, for the plaintiffs.

Gurney & Campbell, for the defendants.

ABBOTT, LD. C. J. The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others. The question for you is, was this check the property of the partners or not? *Verdict for the defendants.*

TAPLEY v. BUTTERFIELD.

1 Met. (Mass.) 515. 1840.

PLAINTIFF claimed title to the goods under a mortgage. Defendant justified his taking of the goods under a writ of attachment in a suit by firm creditors against the firm of A. & W. A. Blaisdell. The mortgage covered the whole stock of that firm, and was executed in the names of both partners by A. Blaisdell, with one seal attached. It was given in payment of a firm debt of $650 due to plaintiff. On the trial, W. A. Blaisdell testified that if he had been present he should not have executed the mortgage. Verdict for plaintiff subject to the opinion of the full court.

Wentworth, for the defendant.

L. Williams, for the plaintiff.

SHAW, C. J. . . . We are not aware that a mortgage of personal property requires a deed. If an act be done, which one partner may do without deed, it is not the less effectual that it is done by deed. . . . Then treating this as an efficient act of one partner in giving a

mortgage upon the partnership property for the security of a partnership debt, is it sufficient to bind the property?

It is within the scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. It is also within the scope of partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He, being authorized to sell the goods to raise money to pay their debts, may apply the goods directly to the payment of the debts; and, according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation. If it were in the form of a consignment to a commission merchant or an auctioneer, and an advance of money obtained for the use of the firm, we think there could be no question but that it would be within the scope of partnership authority. And now that the law has given encouragement to mortgages of personal property, which is only another mode of pledging goods, and has substituted an instrument in writing capable of being recorded in the town clerk's book, and has given to such record an effect equivalent to the actual delivery of the goods, Bullock *v.* Williams, 16 Pick. 33, we cannot perceive why it may not be resorted to by partners as well as individual persons. To what extent one partner can bind another in the disposition of the entire property of the concern, is a question of power, arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised. Lands held by partners are considered as lands held by tenants in common; and as one tenant in common cannot pass any estate of his co-tenant, and as land cannot pass without deed, it follows that one partner cannot convey away the real estate of the firm without special authority.

But considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done by either partner, and considering that it may be done without deed, the court are of opinion that such a mortgage, made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property, and constituted a valid lien upon the property, which the plaintiff may avail himself of. Anderson *v.* Tompkins, 1 Brock. 456; Deckard *v.* Case, 5 Watts, 22. . . .

Judgment on the verdict.

MABBETT *v.* WHITE ET AL.

12 N. Y. 442. 1855.

Action of replevin to recover merchandise which plaintiff, James Mabbett, claimed had been sold to him by the firm of J. S. Fountain

& Co., in payment of a debt owing by that firm to him. The bill of sale was made by one of the partners, Hannah Mabbett, by her attorney in fact, H. F. Mabbett, without Fountain's consent, and Fountain refused to permit plaintiff to take the goods, and brought a suit in chancery to enjoin any interference with them. Pending that action, defendants levied on the goods, under an execution against H. F. Mabbett & J. S. Fountain, a firm which had been succeeded by J. S. Fountain & Co. Plaintiff had judgment.

Francis B. Cutting, for the appellants.

L. B. Shepard, for the respondent.

HAND, J. (After deciding that the firm of Mabbett & Fountain had been dissolved, and succeeded by the firm of J. S. Fountain & Co., consisting of Fountain and Hannah Mabbett, and that the latter had given a valid power of attorney to H. F. Mabbett to do every act necessary to be done by a partner, continued:) The principal question in this case is, as to the power of Hannah, by her attorney, to convey or transfer the property in question to the plaintiff. No doubt, if the transaction between Henry and Hannah Mabbett was for the purpose of defrauding the creditors of Mabbett & Fountain, or the transfer to the plaintiff was for that purpose, or to defraud the creditors of J. S. Fountain & Co., such transfers were void as against the creditors of those firms, respectively, whether with or without the concurrence of Fountain. On these points, the jury have found for the plaintiff. But the judge at the circuit also told the jury that the assent of the partner, Fountain, was not necessary if there was no intention to defraud. In order, therefore, to sustain this judgment, we must hold that where there is a debt due to a *bona fide* creditor from the firm, one member of it may transfer all the goods and chattels of the firm to such creditor to pay the debt, without the knowledge or consent of the other partner who was present, or could have been consulted, there being no intention to defraud the creditors of the firm. . . .

The relation subsisting between partners is of the most intimate and confidential nature. They are joint tenants of the stock and effects of the company; their interests are joint and mutual, and each is seized *per my et per tout;* each has entire possession as well of every part as of the whole; and each of two partners has an undivided moiety of the whole, and not the undivided whole of a moiety. A partnership is a voluntary association by which, in all the affairs connected with the business, an authority is impliedly given to every member to dispose of the partnership property as if it were his own personal effects. Such is the indivisible nature of their interest, and the capacity of every member to act as the authorized agent of all, that whatever one does in the course of the partnership business has the same efficacy as if all had severally and directly joined in the act.

But it is said the disposition of all the personal effects of the firm to pay one creditor, without the consent of the other member of the

firm, when he is present or can be consulted, is not an act in the course of the partnership business, but is a virtual dissolution of the partnership, and fraudulent as to such member. But, as we have seen, one partner, in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole of the partnership interest. The author of a treatise on mercantile law lays down the broad proposition: "Provided the contract have a sufficient relation to the business of the firm; and the contractor have, in other respects, acted *bona fide*, it matters not much what may be its description, nor how grievous the contracting partner's fraud and misconduct." Smith's Mer. Law, 79. And the cases seem to go to that extent. See Coll. Partn. § 445 *et seq.;* Cary on Partn. 29, 30. And, certainly, a creditor has a right to seek and obtain from his debtor a preference for or payment of his debt to the exclusion of other creditors, and that without the imputation of fraud upon either party. I do not say that in no case would equity interfere in favor of a firm against a third person, in case of a contract of sale by one member. But this is an action at law between creditors, and the jury have negatived all fraud in fact on the part of the plaintiff; so that it is simply a question as to the power of sale by one member, without the consent of the other, of all the partnership effects to pay the partnership debts. If the title to the articles of merchandise in question passed at law, the judgment must be affirmed. This sale may have broken up the firm; but there was no agreement between the members of the firm of J. S. Fountain & Co. that it should continue for any definite period. But if there had been, the dissolution (if such was the result) was a mere consequence which did not affect the sale. This *jus disponendi* of each partner is for the advantage of trade and commerce, and no doubt strengthens the credit and benefits the partners themselves; but, however that may be, it is sufficient for the creditor who receives the property in payment of his debt that it exists and has been exercised in his favor without any fraud on his part.

The judgment must be affirmed.

GARDINER, C. J., DEAN, CRIPPEN, and MARVIN, JJ., concurred.

DENIO and JOHNSON, JJ., dissented.[1]

[1] In Ellis *v.* Allen, 80 Ala. 515: 36 A. L. J. 164 (1887), it is declared that "just and open dealing between partners requires that the co-partner, if conveniently accessible, and no sudden, imperative exigency arises, should be consulted, before one partner undertakes to sell the entire stock, either for cash, or to a creditor, in respect to which each has equal right and authority. When the power is so exercised, the transaction is at least open to suspicion of undue advantage. . . . But though one partner may undertake to dispose of the partnership property, the other partner is not powerless. He may protect himself by forbidding or dissenting before the sale is completed."

BRICKETT *v.* DOWNS.

163 Mass. 70: 39 N. E. 776. 1895.

Shorey & Brickett were coal dealers. Defendant rendered services as a dentist to Shorey and his family, and received, in payment therefor, coal, which he knew came from the firm. The firm went into insolvency, and the assignee sold to plaintiff the firm accounts, including the one in suit for the coal delivered to defendant.

The defendant asked the judge to rule that, on the evidence, plaintiff could not recover. The judge refused so to rule, said that there was no evidence of actual fraud on the part of the defendant, and ruled, as requested by the plaintiff, that if Shorey, a member of the firm of Shorey & Brickett, and the defendant, without the knowledge or consent of Brickett, agreed that the defendant, a dentist, should buy coal from said firm, and pay therefor with professional services to be rendered said Shorey or his family, and the coal declared on in this action was delivered thereunder to the defendant without any knowledge of said agreement on the part of said Brickett, or his assent thereto, and dental services to an amount equal to or exceeding the price of said coal were so rendered said Shorey or his family, then said agreement was a fraud on said firm, said dental services were no defence to this action, and the plaintiff, under all the circumstances of the case, could recover. Defendant alleged exception.

Chas. J. McIntire, for plaintiff.

George W. Poore, for defendant.

Knowlton, J. The arrangement made between the defendant and Shorey, a member of the firm of Shorey & Brickett, that the coal delivered to the defendant by Shorey & Brickett should be paid for by setting off the private debt of Shorey to the defendant, and the settlement made on this basis between Shorey and the defendant, without the knowledge of Brickett, were a fraud upon the firm, and are of no effect as against the plaintiff. The finding of the judge that there was no evidence of actual fraud on the part of the defendant must mean that there was no evidence of a wrongful purpose, but only evidence of the legal fraud set out in the bill of exceptions. The facts proved are *prima facie* evidence of fraud upon the partnership, which requires a finding in favor of the plaintiff, unless facts or circumstances are shown which might justify the defendant in believing that the settlement was authorized expressly or impliedly by the other partner. To receive property of a partnership from one of the partners in payment of his personal debt, without the consent of his co-partner, is no less a fraud upon the partnership than to pay a debt due the firm by doing or furnishing something for the personal use of one of its members. Such an arrangement accompanying the receipt of partnership property would be void against the other partner, and would leave the party receiving the property liable upon an implied contract to pay the

firm its value. Homer *v.* Wood, 11 Cush. 62; Williams *v.* Brimhall, 13 Gray, 462; Tay *v.* Ladd, 15 Gray, 296; Farley *v.* Lovell, 103 Mass. 387; Locke *v.* Lewis, 124 Mass. 1.

The reasons for holding that the plaintiff could not maintain his action in Homer *v.* Wood, *ubi supra,* do not apply to this case. This plaintiff, in order to maintain his action, is not obliged to set up the fraud of a person joined with him as co-plaintiff on the record. He succeeds to all the rights of the assignee and of the firm, and he is free from the embarrassment which would attend an attempt by the members of the firm to maintain an action jointly in their own names. By Pub. St. c. 157, § 109, it is expressly provided that "suits upon claims sold by assignees shall be brought in the name of the purchasers." The defendant's settlement with Shorey being ineffectual to bar the debt, the plaintiff can recover the full amount of the debt, as the assignee could have done if it had not been sold.

Exceptions overruled.

H. B. CLAFLIN CO. ET AL. *v.* EVANS ET AL.

45 N. E. 3: 55 Ohio St. 1896.

WILLIAMS, C. J. The plaintiffs in error, it is conceded, are entitled to share in the fund for distribution by the assignee ratably with the creditors who were accorded priority by the judgment below, unless the assignment is invalid, or did not take effect until after the executions were levied.

The validity of the assignment is questioned on the ground that, though executed in the name of the firm, it was so executed by one of the partners only, and without having obtained the consent of the other. That one member of an insolvent firm cannot make a valid assignment of the partnership effects to a trustee for the benefit of its creditors, against the expressed will of a co-partner, or without his assent, when he is present or accessible, was held by this court in Holland *v.* Drake, 29 Ohio St. 441. That decision is placed upon the ground that the appointment of a trustee to dispose of the effects of the firm for the benefit of its creditors is not within the contemplation of the ordinary partnership, or the usual course of its business, and therefore beyond the scope of the agency arising from the partnership relation. The contrary doctrine is maintained by high authority, and with much show of reason.

It is not doubted that one partner may sell any part of the partnership property to one or more of the creditors in payment of the partnership indebtedness, or sell all of its effects to all of its creditors; and, if insufficient to satisfy their debts in full, the sale may be so made to them as to secure a *pro rata* division; and it is not surprising that authorities are found which strenuously maintain that the power of the

partner to accomplish the same result by an assignment to a trustee to make such distribution is included in the agency resulting from the partnership relation. The dissolution of the partnership ensues not less certainly from a sale of the whole of its effects directly to the creditors than from the transfer to a trustee for their benefit. But we are not disposed to depart from the rule laid down in Holland *v.* Drake, *supra,* nor are we disposed to extend it.

It does not apply where the partner whose assent has not been obtained to the assignment was not accessible in the exigency which seemed to call for immediate action, nor where his authority or assent may be fairly implied from the situation of the parties, or the manner of conducting the business. In the case referred to, the partner whose assent was lacking not only resided in the city where the partnership had its place of business, but he was the active managing member of the firm, having control and management of its property and business. The circumstances were such as to repel, rather than give rise to, any inference of authority or assent by him to a final disposition of the firm effects by his co-partner, who had taken no active part in its affairs.

The situation is reversed in the case we have before us. Here the partner who executed the assignment was the active managing member of the firm, having the entire charge and control of the partnership business and custody of its property; and it is plainly inferable from the permanent absence of the other partner, and his total inattention to the business, that he intended to intrust the affairs of the firm wholly to the resident partner. The absent partner, having withdrawn from participation in the conduct of the partnership affairs, and being inaccessible for consultation and advice, might reasonably expect and be held to intend that the member placed in control should not only exercise the implied powers of agency ordinarily possessed by a partner, but, in addition, should have the discretionary power in case of emergency to do what, under the circumstances, should appear to be just and proper in the disposition of the firm property. And where a commercial house so situated is overtaken by financial distress amounting to obvious insolvency, the authority of the acting partner to appropriate the property to the creditors equally, by placing it in the hands of a trustee for that purpose, may well be presumed, in the absence of express dissent by the co-partner, or of circumstances which would fairly indicate his dissent. Equality among creditors of equal merit is favored in equity, and accords with natural justice; and a disposition of the partnership assets, in case of insolvency, which secures that equality, the courts will not be eager to disturb.

The validity of an assignment of the partnership property, executed by one partner in the name of the firm, under circumstances similar to those existing in the present case, was sustained in an opinion by Chief Justice Marshall in Anderson *v.* Tompkins, 1 Brock. 456, and also by the same learned judge in Harrison *v.* Sterry, 5 Cranch, 289. And it

was held in McCullough *v.* Sommerville, 8 Leigh, 415, that, "when a partner resides out of the State where the partnership business is carried on, the managing partner in charge of the business may make a valid assignment of the firm effects for the benefit of its creditors." We find no difficulty, therefore, in sustaining this assignment, both on reason and authority, without calling in question the decision in Holland *v.* Drake, *supra*. . . . The judgment below must be reversed, the application of the defendants in error overruled, and the cause remanded to the probate court for further proceedings.

Judgment accordingly.

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§ 3. NOT DEVESTED BY SALE OF A PARTNER'S INTEREST.

DONER ET AL. *v.* STAUFFER ET AL.

1 P. & W. (Pa.) 198. 1829.

THIS was a feigned issue, directed by the court, and joined between the defendants in error, who were the plaintiffs below (and for whom the verdict passed), and the plaintiffs in error, who were the defendants below.

It appeared from the evidence in the cause that Daniel Howry and Benjamin B. Eshelman entered into partnership in a manufacturing establishment, under the firm of Howry & Eshelman. They became considerably indebted. Judgments were entered and executions were issued against each of them. Abraham Doner, Samuel Herr, John Howry, and Samuel Howry had severally judgments against Daniel Howry, on each of which an execution issued against him, and was levied on the 9th of August, 1825, on the personal property of Daniel Howry and Benjamin B. Eshelman, as partners in trade.

John Stauffer, Christian Breckbill, and Jacob Eshelman had severally obtained judgments against B. B. Eshelman, on each of which judgments an execution was issued against him, and levied on the 11th day of August, 1825, on Benjamin B. Eshelman's share of the personal property of Benjamin B. Eshelman and Daniel Howry, as partners in trade. By virtue of these and other executions the personal property of the firm was sold for the sum of five thousand and seventy dollars and thirty-nine cents, which, after payment of the costs, left a balance of four thousand seven hundred and seventy-nine dollars. This balance was paid into court for distribution.

On a rule obtained by the counsel of Stauffer, Breckbill, and Eshelman, to show cause why the one half of the proceeds of the sale of the firm property should not be applied to the satisfaction of their executions against B. B. Eshelman, the court decided that the execution creditors of Benjamin B. Eshelman had a legal right to his share of and interest in the partnership effects of the firm of Howry & Eshelman, as

it stood on the 11th August, 1825, when the executions were levied; and directed this issue, to try what that share or interest was.

The plaintiffs claimed a moiety or half part of the four thousand seven hundred and seventy-nine dollars as their share,

The plaintiffs, having closed their evidence, the defendants, in support of the issue taken in the cause, offered to prove that the firm of Howry & Eshelman was entirely insolvent on the 11th August, 1825. That the debts and claims against the said firm existing on the said 11th August, 1825, which were then unpaid, greatly exceeded the whole property of the said firm. That Benjamin B. Eshelman, on the said day, had no interest whatever in the said firm, and that Daniel Howry, the other partner, is greatly interested in the application of the funds of the said firm, to the payment of the debts of the said firm, as he is answerable, individually and as a partner for the whole of the said debts. Which offer being objected to, the court overruled the same, and delivered the following opinion, to wit: "I am satisfied that the authorities cited settle the law as it applies to the cases decided, that is to say, to cases where there are separate executions against one partner levied on the partnership effects. But this is a case where the whole partnership effects are swept away by separate executions against each partner, where the creditors at large have no lien. I must say that the principal object in directing this issue was, as it was a case of great importance, to give an opportunity of completely considering and reviewing the law on the subject. But I am very clear that Benjamin B. Eshelman's interest, or want of interest, cannot be shown by evidence of debts due from the firm, and that the testimony offered relative to the insolvency of the firm, and the interest of Daniel Howry in the application of the funds of the firm to the payment of its debts, cannot be admitted."

To this opinion, overruling the evidence offered, the defendants excepted.

Although the issue joined was between the separate execution creditors of the respective partners, the counsel for the defence appeared for the joint creditors of the firm, to controvert the right of the separate creditors of Eshelman, to be paid out of the fund in court, before the joint creditors were satisfied; and they alleged that, after the executions of the separate creditors were levied, Howry & Eshelman had made an assignment to trustees for the benefit of the creditors of the firm.

The only question now raised in this court, upon the charge of the court below and the bill of exceptions, was, whether the separate execution creditors of Eshelman had a right to be paid out of the proceeds of the sales of the goods of the firm before the joint creditors were satisfied out of that fund.

Norris, for the joint creditors.

Hopkins, for the plaintiffs in error.

The opinion of the court was delivered by GIBSON, C. J. It is settled by a train of decisions in the American, as well as the British

courts, that the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts; and, consequently, that no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution. That a contract which enables the parties to keep a class of their creditors at bay, and yet retain the *indicia* of ownership, should not have been deemed within the statutes of Elizabeth, is attributable exclusively to the disposition universally manifested by courts of justice to encourage trade. But, such as it is, has the contract of partnership been established; and the principle which enables the partners to pledge to each other the joint effects as a fund for payment of the joint debts has introduced a preference in favor of the joint creditors, founded on no merits of their own, but on the equity which springs from the nature of the contract between the partners themselves. The author of the Commentaries on American Law, vol. iii., page 38, attributes this preference to an inherent equity in the joint creditors themselves, arising from a supposed acquisition of the partnership effects from their means. The opinions of Chancellor Kent are so justly entitled to deference that no prudent judge will differ from him without hesitation; yet I cannot but adhere to the opinion I expressed in Bell *v.* Newman, 5 S. & R. 92, that in cases of insolvency or bankruptcy, in which alone the question of priority can be material, the joint effects consist of the wreck of the capital originally embarked. Under a joint commission, by which the effects pass to the assignees, while the partners are personally discharged, I admit that the preference of the joint creditors has no other foundation, if it has any at all, than this supposed inherent equity; and the best elementary writer on the subject so disposes of the difficulty. Gow on Partnership, 341, 342. But in the case of a separate commission, Lord Eldon expressly puts it on the particular equity of the partners themselves: *Ex parte* Ruffin, 6 Ves. 119; and in the case of an execution, Chief Baron M'Donald does the same. Taylor *v.* Fields, 4 Ves. 396. To secure the firm from the extravagance of its members, by preventing the capital from being withdrawn from the purposes of the partnership, the stock is pledged for the burden which, from the nature of the connection, is to be borne by all; but, in moulding the law of partnership to its present form, the credit gained by giving the joint creditors a preference was, if an object at all, a very remote one. Accordingly, with the single exception of a joint commission, we find that wherever the partners are not individually involved, the joint creditors have no preference whatever; as in the instance of a *bona fide* assignment of the effects to one of the partners, after the partnership has been dissolved.

In consequence of the rule as I have stated it, a separate execution creditor sells, not the chattels of the partnership, but the interest of the partner, incumbered with the joint debts; and the joint creditors, therefore, have no claim to the proceeds. To allow them the proceeds, and recourse to the property in the hands of the purchaser, would subject

it to a double satisfaction. Neither can they take the proceeds or the property at their election. They can interfere at all only on the ground of a preference, which has regard only to the partnership effects; and these have not been sold, but only the subordinate interest of the partner, which was, strictly speaking, his separate estate. Their recourse, therefore, is necessarily to the property in the hands of the purchaser. Now, had the sheriff sold the interest of but one of the partners, the execution creditor would have clearly been entitled to the proceeds. But although he sold the whole stock at one operation, on separate executions against both, there was, in contemplation of law, a separate sale of the interest of each. What, then, would have been the effect had these sales been made consecutively? The first, in the order of time, would have passed the interest of the partner, subject to the equity of his co-partner, and the execution creditor would have been entitled to the price. But this equity, together with the remaining interest of the other partner, would have passed by the succeeding sale to the same purchaser; the execution creditor, in that instance, also taking the proceeds. Can it make a difference, then, that instead of being consecutive these two sales were simultaneous? A curious question might arise whether separate purchasers of the shares respectively would stand in the relation of partners, so as to enable the joint creditors to follow the goods. It seems to me they would not, because not personally involved in payment of the debts. Here, however, where the shares of the partners are united in the same purchaser, every semblance of partnership equities is at an end. As regards the goods in the hands of the purchasers, this is conceded; but the joint creditors insist that the proceeds are to be substituted for the goods, and subjected to the same equities. That might be done if the proceeds belonged to the partners; but it is not easy to imagine how they are to be treated as the owners of money raised by a sale on executions against them. For what purpose should the ownership of it be vested in them, even for an instant? Not to give the joint creditors a preference, for that would make the rights of the partners depend on the claims of the joint creditors, who, on the contrary, can claim nothing but by virtue of the lien, where there is one, of the partners. To say that the partners have such a lien because the joint creditors have an equity, and that the joint creditors have an equity because the partners have a lien, would be to argue in a circle. Here the partners cannot be prejudiced in respect of their claims on each other, the advantage to be gained from an application of the joint effects to their separate debts being mutual and equal. The consequences are precisely the same as if the effects had been sold on an execution against both. We are, therefore, of opinion that the joint creditors cannot interpose; and, consequently, that the rejection of the evidence, as well as the direction to the jury, was substantially right.

I have considered the question on principles applicable to it, in analogy to well-settled parts of the law of partnership, rather than on

authority bearing directly on the point. But since this opinion was drawn, my Brother HUSTON has directed my attention to the case of Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320, which is direct to the point; so that, independent of analogies, we have an authority on which we might safely rule the cause. But both principle and authority are adverse to the preference claimed, and the issue, therefore, was correctly found for the plaintiff.

HUSTON, J., dissented.

ROGERS, J., was sitting at *nisi prius*, and took no part in the judgment. *Judgment affirmed.*

MENAGH *v.* WHITWELL ET AL.

52 N. Y. 146. 1873.

THIS action was for conversion. The property consisted of machinery, utensils, lumber, and other chattels, formerly belonging to the firm of J. C. Smith & Co., and appertaining to a yeast factory operated by that firm.

From the 17th of August to the 22d day of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington, and William B. Rubert, each being interested to the extent of one-fifth.

The firm, as thus constituted, contracted debts to the Geneva National Bank, upon which judgments were afterward recovered against the above-named parties; viz., one judgment for $1,403.83, and one for $237.53, both recovered May 24, 1867. The larger judgment embraced claims to the amount of $330, which accrued after the withdrawal of John Wride from the firm.

Executions were issued on these judgments on the 25th of May, 1867, and placed in the hands of the defendant Ringer, who was deputy sheriff of Ontario County; and, by virtue of those executions, he levied upon the property on the 19th of July, 1867, and sold it on the 29th of July, 1867. The defendant Whitwell was sheriff; and this action was brought against him and his deputy for that levy and sale. The plaintiff recovered four-fifths of the value of the property.

The plaintiff makes title to this four-fifths as follows: —

On the 22d of December, 1866, John Wride assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the firm debts; and, on the 4th of February, 1867, Marietta Huntington assigned all her interest in the property of the firm to said John C. Smith, who assumed her place in the firm. After these transfers the same business was carried on by the remaining partners, under the same firm name. The referee finds that both of these transfers were made with the consent of all the other members of the firm, and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm then consisting of John C. Smith, William B. Rubert, and Hollister E. Goodwin, and Smith's interest being then three-fifths, he gave to the plaintiff a chattel mortgage upon his undivided three-fifths interest in the yeast factory, property, accounts, and other choses in action of the firm, to secure his individual debt to the plaintiff of $2,400, payable in instalments, in two, five, and seven months, with power to take possession and sell, in case of default, or whenever she should deem herself unsafe, before default. The referee finds that this amount was justly due to the plaintiff for money loaned by her to Smith, which he had used for the firm, and for which it was indebted to him; and that the mortgage was given in good faith, with the consent of all the persons composing the firm, and without intent to defraud creditors. There is no express finding in respect to the solvency of the firm at the time of the giving of this mortgage.

On the 2d of February, 1867, William B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert, to secure an individual debt of $500, payable in five days. The referee finds that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fraudulent intent. It does not appear that any of the other partners consented to this mortgage.

On the 10th of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages; and, after advertisement, it was sold on the 18th of May, 1867, the three-fifths interest of John C. Smith being purchased by the plaintiff for $1,000, and the one-fifth interest of William B. Rubert being bought in by Samuel E. Rubert, for an amount less than his mortgage.

On the same day, John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes, and other material then on the premises, and belonging to the firm, for $200, which was applied in part payment of the plaintiff's mortgage. The referee finds that this sale was in good faith, and without any fraudulent intent. This lumber, etc., was levied upon and sold by the defendants, and is embraced in the plaintiff's recovery.

On the same day on which the plaintiff and Samuel E. Rubert took possession under their mortgages, — viz., the 10th of May, 1867, — Hollister E. Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm. The referee has not found that there was any consideration for this transfer, or what was its object, or that it was made in good faith.

The only findings in respect to the solvency of the firm at the times of these several transactions are, that, on the 22d of December, 1866, when John Wride withdrew from the firm, transferring his interest to John C. Smith, the firm was somewhat embarrassed, but was not known

or believed to be insolvent by either Wride or Smith; and that, on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866; that the firm was largely indebted, and somewhat embarrassed; that the value of its property and assets depended in part upon the continuance of its business; and, in case such business were continued and properly managed, the property and assets of the firm were more than sufficient to pay its debts.

The referee further finds that, at the time of the seizure and levy by the defendants, the property was in the possession of the plaintiff and Samuel E. Rubert, and was of the value of $2,150; that the plaintiff was the owner of an undivided three-fifths and Samuel E. Rubert of one undivided fifth part thereof, and that Mary B. Goodwin was the owner of the other undivided fifth part thereof; and that, on the 15th of August, 1867, and before the commencement of this action, the said Samuel duly assigned to the plaintiff all his right to the property and cause of action against the defendants for the taking possession thereof.

As conclusions of law, he finds that, at the time of the levy, neither of the defendants in the executions had any leviable interest in the property, but that it belonged four-fifths to the plaintiff, and one-fifth to Mary B. Goodwin; that the bank had no lien thereon; and that the plaintiff was entitled to recover four-fifths of the value, amounting to $1,720, with interest from the time of the conversion.

W. F. Cogswell, for the appellants.

E. Countryman, for the respondent.

RAPALLO, J. The mortgages executed by John C. Smith and William B. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the *corpus* of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void, as to the creditors of the firm, under the principle of the cases of Ransom *v.* Van Deventer, 41 Barb. 307, and Wilson *v.* Robertson, 21 N. Y. 587, unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The Supreme Court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish the solvency of the firm at the time the mortgages were given. We cannot concur in this view of the effect of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given; and, if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its

properties to the individual debts of two of the partners would make it insolvent.

According to these findings, the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed; and the value of its property, and its consequent ability to pay its debts, depended in part upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the *corpus* of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners respectively, after payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors; and the plaintiff was, consequently, not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the remaining partner was entitled to the control of the firm property, so long as he retained his interest, and to apply it to the firm debts, and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts.

And, so long as any of the partners had this dominion over the firm property, it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. Lovejoy *v.* Bowers, 11 N. H. 404; Coover's Appeal, 29 Pa. St. 9; Pierce *v.* Jackson, 6 Mass. 243.

But the point upon which the judgment was sustained in the Supreme Court, at General Term, was, that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a transfer to a third party of his individual interest in the partnership properties, and on this ground it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon; and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert under his mortgage, was entitled, by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the *corpus* of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners devested the title of the firm; that firm creditors have no lien upon the partnership effects, and no direct right to compel

their application to firm debts in preference to individual debts; that the right to compel this application is an equity vested in the partners themselves, and exists only as between each other; that, so long as this equity exists in any of the partners, the creditors have an equity to compel its enforcement between the partners, and may by this means obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners; in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises the conclusions have been drawn that, if such equities are waived or released by the partners themselves, the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that, if the individual interests of each of the members of a firm are successively sold under executions against such members respectively for their individual debts, the purchasers acquire the *corpus* of the property free from the co-partnership debts, and the equities of the partners and partnership creditors are extinguished. Coover's Appeal, 29 Pa. St. 9.

The injustice, and, it may be said, the absurdities, which result from such a view lead to an inquiry into its correctness. A firm may be perfectly solvent, though the members are individually insolvent; yet in such a case the doctrine that the property of the firm is devested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all the partners, might result, not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of $300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is $50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it $50,000, which is its actual value; the share of another of the partners is sold out under execution and brings its full value, $50,000. Thus far one partner remains, and he has an equity to have the firm debts paid; and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only; the joint creditors still have their recourse against the partnership property and the right to levy on such of it as is subject to sale on execution; but before any levy, the remaining partner sells out his individual interest, or it is sold out on execution. According to the doctrine applied in the present case, and maintained in the case of Coover's Appeal, *supra*, the firm property is, by this last sale, relieved from the partnership debts, the two shares first sold are at once changed from

interests in the surplus to shares in the *corpus* of the property free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only the separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affairs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts; and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's equity as to any property which must be reached in that form. But, on the 10th of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one Mary B. Goodwin; and, on the same day, the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is, that Hollister E. Goodwin being the only remaining partner, the transfer of his interest devested him of his dominion over the partnership property, and of his equity to require the application of the partnership property to the payment of its debts; and that, as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferees of the individual partners, unincumbered by firm debts.

Waiving any question as to the *bona fides* of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him, we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners.

It would be a superfluous labor to trace the history of the changes which have from time to time taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine that, as between a firm and its creditors, the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint stock until the firm debts are paid, and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained.

The *corpus* of the effects is joint property, and neither partner separately has anything in that *corpus;* but the interest of each is only his share of what remains after the partnership debts are paid, and accounts are taken. West *v.* Skip, 1 Ves. 239; Fox *v.* Hanbury, Cowp. 445; Taylor *v.* Fields, 4 Ves. 396; 15 Ves. 559, note; Pierce *v.* Jackson, 6 Mass. 243; Doner *v.* Stauffer, 1 P. & W. 198; 2 Kent, Com. (11th ed.) 78, note; Collyer on Partn. (3d Am. ed. Perkins), notes to § 822, pp. 704 to 710; Story on Partn., notes to §§ 261, 262, 263; Crane *v.* French, 1 Wend. 311; Witter *v.* Richards, 10 Conn. 27.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. 3 Kent, Com. 76, 11th ed.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold; and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. 3 Kent, Com. 78, note b, 11th ed.

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. 1 Ves. 241, Am. ed. note; 15 Ves. 557.

No person deriving under a partner can be in a better condition than the partner himself. Fox *v.* Hanbury, Cowp. 445.

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner of his undivided interest cannot avail against the creditors of the partnership who attach the partnership property. Lovejoy *v.* Bowers, 11 N. H. 404.

These principles have been enunciated in a great number of cases where some one, at least, of the partners retained his equity to have the firm debts paid; and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside parties has been considered, except the case of Doner *v.* Stauffer, 1 Pa. (Penrose & Watts), 198, and Coover's Appeal, 29 Pa. St. 9, before referred to. In neither of these cases is the point adjudicated, for in both cases the joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained, though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases, in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is, where

a *bona fide* sale has been made by a retiring partner in a solvent firm of two members to his co-partner, the latter assuming the debts. In such a case, it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors, in case of his subsequent insolvency. *Ex parte* Ruffin, 6 Ves. 119; Dimon *v.* Hazard, 32 N. Y. 65. But, in those cases, the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property; and the exercise of that power, when free from fraud, devested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is, What is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third person? Where the property remains in specie, and no act has been done by the firm to devest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to firm creditors, as firm property, or has it become the absolute property of the several transferees of the interests of the individual partners?

It has been shown that no share in the *corpus* of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that, when all the partners have assigned, their interest in the property is devested, and their equity is destroyed, and therefore the property is released from the debts, and what was, at the time of the assignment, a share of a contingent surplus, has been converted into a share of the *corpus* of the property. Is this position sound? When a partner sells his interest in a firm to a person other than his co-partner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his co-partner, he relies upon his assumption of the partnership debts; and, unless he stipulates for an application of the assets to that purpose, he parts with all lien upon them. But when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the property a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interests of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the *corpus* of the property, and leave him liable for the debts? If the legal effect of the transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right

to an account, and to the partner's share in the surplus, after payment of the debts, when ascertained, and that he had no right to that part of the property which was required for the payment of debts; that the sale was subject to the debts. 3 Kent, Com. 76–78. The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser; and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring co-partner to his co-partner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, where the firm property remains in specie, and is tangible and capable of being levied upon, to resort to the equities of the partners, in case there has been no transfer by the firm, and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of these transfers is to devest the title of the firm, then, if effected by the acts of a partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of Ransom *v.* Van Deventer, 41 Barb. 307, and Wilson *v.* Robertson, 21 N. Y. 587. An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his co-partners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually devest the firm of all its property, and apply it to their individual debts, leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the *corpus* of the property, or at least to so much of it as is necessary for the debts, is not devested by these separate transfers to strangers.

As is stated by Professor Parsons, in his work on Partnership (c. 10, § 1, pages 356 to 362, 2d ed.), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The

well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgment that a partnership is a body by itself. In its relation to its creditors, it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts; and, after this work is done, there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property free from the joint debts would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be devested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it, without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power; and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately than when made by a portion of them; but the property should be deemed to continue in the firm until its title has been devested by some act of the firm.

My conclusion is, that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests.

I have not adverted to the changes which took place in the firm by the retirement of John Wride and M. Huntington, and the transfer by them of their interests to J. C. Smith, intermediate the contracting of the debt to the Bank of Geneva and the levy, the effect of these changes being fully considered in the opinion of my learned associate, ALLEN, J.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

ALLEN, J. I fully concur in the legal conclusions of my Brother RAPALLO, and for the reasons assigned by him. . . .

A single question only will be considered; and that is, as to the effect of the retirement of two of the partners, Wride and Huntington, by the transfer of their interests to another partner, Smith, after the debts were contracted with the Geneva National Bank and before the recovery of the judgments upon which the property was seized by the defendants. That the withdrawal of two of the five partners, and a transfer of their interests to one of the three remaining partners, was a dissolution of the co-partnership that had theretofore existed, is not controverted; that is, although a firm, composed of a part of the members of the old firm, continued the business in the same name, still it was not composed of all the original members of the firm, and therefore strictly the old partnership was dissolved, and superseded by the new organization. But the dissolution had respect to the future, and not to the past. Past transactions and existing liabilities, and the relative rights and obligations of the several partners, or the rights of creditors, in respect to past transactions and dealings, were not affected by the mere act of dissolution resulting from such withdrawal of the two and the assignment of their interest aside from any conventional arrangement between the partners, or between them and their creditors, by which their respective and relative rights might be changed. The partners all continued liable *in solido* for the debts due by the firm; and all the joint property continued liable for the joint debts, as it was before.

Heath, J., says, in Wood *v.* Braddick, 1 Taunt. 104: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue;" and Lord Mansfield, C. J., in the same case, says: "The powers of partners with respect to rights created pending the partnership remain after the dissolution;" and see Parsons on Partnership, 386, 396.

From the time of the withdrawal of the two partners, their power to act for or represent the continuing members of the firm in new transactions ceased; and perhaps they relinquished their right to contract or deal with the joint property, as they might have done in concurrence with the other partners, had the partnership been closed, and the business settled up, instead of being continued with a change in its membership. It is said also that one partner selling his interest to a co-partner, who assumes his share of the partnership debts, does not, in the absence of a stipulation to that effect, have any lien, equitable or otherwise, upon the firm property for the payment of the joint debts for which he still remains liable. Dimon *v.* Hazard, 32 N. Y. 65. This must be so when new rights have attached by reason of such change of interests, as where the transfer is to a sole partner, who becomes thereby the individual owner of the property, and rights of individual creditors have accrued, as in Howe *v.* Lawrence, 9 Cush. 553, and Robb *v.* Mudge, 14 Gray, 534, or where the new firm which has resulted from the change of interests have exer-

cised the *jus disponendi*, which they have over the property, or there are creditors of the new firm who have the *quasi* lien recognized by the law. But I see no reason why, so long as the retiring partner remains liable with the others for the joint debts, and no adverse or paramount rights or liens have attached to the joint property, the same equity should not be recognized as existing in him to have the joint property subjected to the payment of the joint debts that he would have had as a continuing partner.

But whatever may be the rights and equities of Wride and Huntington, the retiring partners, the equities of the continuing partners, especially those of Rubert and Goodwin, were not impaired or affected by the transfer of interests by Wride and Huntington to Smith, the other partner. By those transfers Smith only acquired the same interest in the property of the firm that any other transferee would have acquired; that is, a right as to the two-fifths thus purchased, to an account, and to share to that extent in the surplus of the property of the firm. The fact that he was a partner does not change the character or the legal effect of the transaction. It was an arrangement between three of five partners; and they could not dispose of the *corpus* of the joint property to the prejudice of the other partners or the creditors of the firm, or destroy the joint interest which before existed. Smith took the transfer, subject to the rights of the other partners as to the joint property, and the share or portion of the retiring or withdrawing members. The rights of an assignee or transferee of the individual share or interest of a partner in the joint property are well settled to be but a right to an accounting, or to what shall remain after the adjustment of the partnership accounts and dealings. Mumford *v.* McKay, 8 W. R. 442; Nicoll *v.* Mumford, 4 J. C. R. 522.

The assignee of a partner's interest cannot withdraw his share of the joint effects. They must remain in the possession of the continuing partners, for the purpose of winding up the partnership which has been dissolved by the assignment. Horton's Appeal, 13 Pa. St. 67.

Smith could no more have withdrawn the share of Wride and Huntington, to which he had succeeded, than he could have withdrawn his own original share in the joint effects of the firm without the consent of his co-partners.

Although the original partnership has ceased to exist, the rights of the partners have not been impaired. The new firm acquired and had the absolute power of disposal; and, had the joint property been transferred by the joint act of all, the creditors of the old firm would have lost their *quasi* lien or their right to pursue this property, unless they could impeach the transfer for fraud.

Had the firm, after the change of interests therein, incurred liabilities and contracted debts, a question would have arisen between the creditors of the old and new firms; and the creditors of the new would have been preferred. But no such question is in this case. The property of the original firm, composed of the five members, is still joint

property with respect to the partners still retaining an interest in it, who are tenants in common, and the creditors of that firm to whom all the parties remain liable, and through whom and whose equities and the equities of each of them they can, in the language of the books, work out their rights.

Judge Story says: "In case of a dissolution, each partner holds the joint property, clothed with a trust to apply it to the payment of the joint debts, and subject thereto to be distributed among the partners, according to their respective shares therein." Story on Partn. § 360. Here the three partners composing the new firm, as partners and tenants in common, held this property, clothed with this trust; and neither could withdraw any part of it, nor do any act to impair this trust. All must unite, in order to give effect and validity to any disposal of the property, except in execution of the trust or in the ordinary course of business. A transfer in payment or security of an individual debt of one is not such an act, and does not impair the trust or affect the rights of the other tenants in common or partners, or creditors having claims to be enforced through their equities. It is only when the rights of partners as such with respect to the joint property are gone that the *quasi* lien of creditors is destroyed. While this right of creditors is spoken of as in the nature of a lien, or a *quasi* lien, and depending to a great extent upon the equities of partners *inter se*, it is to be enforced against the joint effects of the partners by a common-law action and common-law remedies, except where the dissolution is by the death or bankruptcy of one of the partners. Story on Partn. § 361.

The parties who claim to have acquired severally, by transfer from the individual partners, the respective shares of such partners, each having only the right which the law gives the assignee of the share of a single partner, if they have in any way obtained possession of the property itself, must hold it clothed with the trust which would have attached to it in the possession of the partners, their assignors; and, as to the *corpus* of the property, it remains the joint property of the firm, and liable to be seized for its debts. There has been no distribution of the property among the partners; and it has not been transferred by them as partners by any joint act, or by the act of one in the name of all, and no creditors of the later firm assert any claim to it. So long as the property continues, the firm creditors may assert their priority of right to it as against the creditors or transferees of individual partners. Allen *v.* Center Valley Co., 21 Conn. 130; 2 Story, Eq. Jur. § 1253. It is joint *quoad* the partners and the firm creditors, so long as any one of the partners may insist upon the partnership claims to it. Crawshay *v.* Collins, 15 Ves. 237; Peacock *v.* Peacock, 16 Ves. 57. Here neither the partners, nor any one claiming as creditors of or under title derived from the firm, assert any claim to the property adverse to the defendants. Had a stranger to the first firm come into the second, in the place of the retiring members, a different question would have arisen. But here the continuing members of the

firm are all liable for the debts of the old firm, and as successors of that firm have possession and ownership of its property, primarily chargeable with the payment of its debts; and there is no foundation in principle for the claim that each of the partners can transfer his share, subject only to the claims that may exist growing out of the new relations of the partners consequent on the withdrawal of the two retiring members; and this must be established to entitle the plaintiff to hold her judgment. If Rubert and Goodwin could only assert a lien for the liabilities of the three as a firm, incurred after Smith acquired the additional two-fifth interests from Wride and Huntington, then the plaintiff has a good title to the undivided share and portion of the *corpus* of the estate for which she has been permitted to recover in the court below; otherwise, not.

We are cited to several cases, of which *Ex parte* Ruffin, 6 Ves. 119, is the pioneer as showing that, upon the dissolution of a partnership by the retiring of one, the creditors of the firm lose all power to enforce the payment of their debts from the joint property. But such is not the effect of the decisions, nor can such a principle be deduced from them. They are entirely consistent with the views now taken of the rights of the parties to this action. *Ex parte* Ruffin was the case of a dissolution of partnership between two, one retiring and assigning the partnership property to the other, who continued the trade, and became bankrupt. It was decided, and could not well have been decided otherwise, that, by the dissolution and transfer, the property became the individual property of the bankrupt, and liable to his individual debts in priority to the debts of the former partnership. The retiring partner gave to the bankrupt the entire property, with the absolute right of disposal; and the Lord Chancellor held that joint debts could not be proved against the individual estate. The like question presented in Dimon *v.* Hazard, 32 N. Y. 65; Horton's Appeal, *supra;* and Robb *v.* Mudge, 14 Gray, 534, received the same solution. The same principle was applied in Smith *v.* Howard, 20 How. Pr. 121, and Baker's Appeal, 21 Pa. St. 76.

The only difference in the several cases was circumstantial, and did not call for the application of any other or different rule. The decisions all stand upon the same reasons. In the last two cases, the retiring partner transferred his interest to several partners, who continued the business; and it was held that the firm creditors had no such lien upon the property as would prevent the disposal of the property by the joint act of those who had become the owners, or deprive the creditors of the new firm of a priority. Smith *v.* Howard sustained an assignment by the two partners, to whom the other partner had transferred his interest, for the benefit of creditors, in which a note indorsed by a third person as their security, and given to the retiring partner in payment for his interest, was preferred. In Baker's Appeal a like assignment by the continuing partners, preferring the debts of the new firm, was sustained. These cases are clearly distinguish-

able from this. If the partners who had acquired the joint right to dispose of the property had exercised it without fraud, and as the creditors of the first or former firm had no specific liens, they could not, in the absence of any fraud, have impeached the transfer.

Judge Gibson, in Doner *v.* Stauffer, *supra*, intimates an opinion upon a theoretical case, adverse to the views now taken. While restricting the purchaser of the share of a single partner to what might remain after the payment of the partnership debts, he says: "A curious question might arise whether separate purchasers of the shares respectively would stand in the relation of partners, so as to enable the joint creditors to follow the goods," and intimates an opinion in the negative; but the question was not in the case. To me it seems illogical, the premises being granted, that a sale by a partner, or upon an execution against him for an individual debt, carries only a right to what may remain after the payment of the partnership debts, — thus affirming the right of partnership creditors to a priority of payment and a *quasi* lien on the joint effects, — to declare that such preference is destroyed and right lost by distinct, independent transfers of the individual interests of the several partners, and that while each partner, or the creditor of each individual partner, can only have dominion or acquire a title to the surplus; when each has exercised this right or the individual creditors of all have seized and sold this right to the surplus, the rights of each are at once enlarged by relation, as of the time of the first transfer of interest of any one of the partners to the destruction of the acknowledged rights of the partners *inter se* and of the joint creditors.

In Brinkerhoff *v.* Marvin, 5 J. C. R. 320, separate and successive judgments against individual partners for a single partnership debt were held entitled to be paid from the partnership funds, — the Chancellor giving the same effect to the two judgments as if they had been consolidated in a joint judgment against both the partners.

This is, so far as reported decisions have come under my observation, a case of the first impression; but, by the application of well-established principles, and carrying to their legitimate and logical results the doctrines fairly deducible from authoritative adjudications, and giving proper effect to the recognized rights and equities of partnership creditors, as now understood, the plaintiff did not acquire a valid title to the partnership effects, or to any part or undivided share or portion thereof, so as to give her a property in the *corpus* of the goods and effects as against the judgment and execution creditors of the firm.

The judgment should be reversed, and a new trial granted.

All concur in both opinions.

FOLGER and ANDREWS, JJ., not sitting.

Judgment reversed.

STAHL ET AL. v. OSMERS ET AL.

49 Pac. (Or.) 958. 1897.

THE object of this suit is to compel the vendees of partnership property acquired from the individual partners to account for and apply the proceeds thereof to the payment of partnership debts. On July 6, 1893, the defendants, Dan Osmers and Mat Hughes, were partners in the saloon business at Heppner, and were the owners of a stock of wines, liquors, and cigars of the alleged value of $800, and were insolvent. On that day the partnership property was attached for the individual debt of Osmers at the suit of Ruehl, and under an execution on a subsequently recovered judgment his interest therein was sold to the defendant, William Hughes, for the sum of $200. On the day following the attachment, the other partner, Mat Hughes, sold and transferred all his interest in the firm property to the defendant, John Hughes, for the sum of $600, who, together with the purchaser at the sheriff's sale, took possession of the entire partnership property, and disposed of it for their own use and benefit. The plaintiffs, — who are creditors of the firm of Osmers & Hughes, — having reduced their claims to judgment, and an execution having been issued thereon, and returned *nulla bona*, began this suit on March 10, 1894, to compel the defendants and John Hughes to account for and apply in payment of their judgment the proceeds of the property formerly belonging to said partnership. The decree of the court below was in favor of defendants, and plaintiffs appeal.

Frank Kellogg, for appellants.

Rea & Lyons, for respondents.

BEAN, J. The complaint charges fraud in the sale and transfer by the defendant, Mat Hughes, of his interest in the partnership property to his co-defendant, John Hughes. But this allegation is wholly unsupported by evidence, and therefore the only question for determination on this appeal is whether simple contract creditors of a partnership have such a lien upon the assets of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with their interest therein. Upon this question there is some conflict in the adjudged cases, but the great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual, debts.

The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement, and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, how-

ever, a derivative one only, and not held or enforced in his own right; in other words, "the equities of the creditors can only be worked out through the equities of the partners." From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors cannot do so. The *quasi* lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien, it of course cannot exist after the debtor had himself ceased to have any lien from which it could be derived.

The leading case upon this subject is, perhaps, that of Case *v.* Beauregard, 99 U. S. 119, in which it was held that transfers made by the individual members of an insolvent firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore, a complete bar to a bill filed by the partnership creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice Matthews in Fitzpatrick *v.* Flannagan, 106 U. S. 654.. He says: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself 'retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.' Such was the language of this court in Case *v.* Beauregard, 99 U. S. 119, in which Mr. Justice Strong, delivering its opinion, continued as follows: 'It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodiam legis*.' Hence it follows that 'if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.'"

And in Schmidlapp *v.* Currie, 55 Miss. 600, the rule is admirably stated by Mr. Justice Chalmers as follows: "The firm creditors at

large of a partnership have no lien on its assets any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus, where upon a dissolution of the firm by death or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned shall be applied to the liabilities of its separate owner, so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is, therefore, really the right of their debtors, and enures to them derivatively from the debtors. Hence it is said that the lien or *quasi* lien of the creditor 'is worked out through the partners,' the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts, because each one of the partners would have a right to demand this as against his co-partners." This doctrine is likewise supported by the following authorities: 2 Bates, Partn. § 824; T. Pars. Partn. § 246 *et seq.*, and note; Huiskamp *v.* Wagon Co., 121 U. S. 310; Goldsmith *v.* Eichold, 94 Ala. 116; Jones *v.* Fletcher, 42 Ark. 423; Woolen Mills *v.* Conklin, 26 Iowa, 422; and many others which it is not deemed necessary to cite.

The courts of New York (Menagh *v.* Whitwell, 52 N. Y. 146), and perhaps those of another state or two, seem to hold to a contrary doctrine, but they are decidedly in the minority, and we are not sufficiently impressed with the soundness of the reasons upon which their decisions are founded to follow them in opposition to what we conceive to be the great weight of authority.

Applying the doctrine stated to the case in hand, the solution is clear. It is admitted by the complaint that the entire right and interest of each of the partners in the firm of Osmers & Hughes in the partnership property had been sold and transferred long prior to the

commencement of this suit, and that neither of such partners had any interest therein at the time the suit was commenced, and hence, under the rule stated, it cannot be maintained.

The decree must therefore be affirmed, and it is so ordered.

WOOD v. AMERICAN FIRE INS. CO.

149 N. Y. 382: 44 N. E. 80. 1896.

O'Brien, J. The plaintiff recovered upon a policy of insurance, of which she was the assignee, issued by the defendant, upon a building used as a store, January 9, 1891, and which was destroyed by fire March 31, 1891. The only defences interposed by the answer, which were proven and found at the trial, were: (1) That Wood Brothers, a firm composed of six brothers, which owned the property and procured the insurance, had not, at the time, the sole and unconditional title or ownership of the property; and (2) that the property covered by the policy had been sold upon judgment and execution against the firm some days before the loss. The contract was made by means of what is known as the "standard policy," which contained the condition that it "shall be void . . . if the interest of the insured shall be other than unconditional and sole ownership, or . . . if any change, other than by the death of an assured, take place in the interest, title, or possession of the subject of the insurance, . . . whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

With respect to the defence first referred to, it appeared that in the year 1885, one of the individuals composing the firm made a general assignment of his individual property for the benefit of his creditors, and also of his interest in the firm; that in 1888 his assignee sold whatever interest in the firm property that passed to him by the assignment to a third party, and before the policy was issued had accounted and been discharged. The assignee had no accounting with the firm in order to ascertain what interest the assignor had, in the surplus, if any, and no claim was ever made upon the firm for anything passing by the assignment. It appeared by the proofs and findings that the defendant's agents, who were, as may be fairly inferred, general agents, knew, at the time of issuing the policy and before, all the facts and circumstances with respect to the individual assignment and the transfer of that interest as above stated.

The answer to the defence, based upon these facts, is twofold: (1) That, since the title to the real estate held by a partnership is in the firm, and not in the individual members of it, the transfer of the interest of one of the members, before the insurance, had no effect upon the unconditional and sole ownership of the firm; that an assignment by one partner of his share in the partnership stock simply transfers

any interest he may have in any surplus remaining after payment of the firm debts and the settlement of the firm accounts. Whether the purchaser of such an interest takes anything whatever by the transfer cannot be known until all the partnership affairs have been settled and adjusted. Menagh *v.* Whitwell, 52 N. Y. 146. The title to the real property, which was the subject of the insurance, was in the partnership firm, and was not affected by the assignment of one of the members. It still remained firm property, since the assignee had no interest in it as such, and whether the sale or transfer by the individual member was anything more than a mere form, or conveyed anything to the assignee, must depend upon the existence of a surplus after the partnership affairs are adjusted. It does not even appear, in this case, that there would then be any surplus to divide, though that circumstance cannot be regarded as material upon the question whether such a transfer by a member affects or changes the estate or interest which the firm has in the partnership realty. (2) That general agents of an insurance company may waive stipulations and provisions, contained in the policy, with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it, with knowledge of all the facts, and receiving the premium, has long been settled.[1] . . .

All concur, except GRAY, J., who dissents upon the ground that the policy was avoided by the change of interest effected by the sale of the property.[2]

Judgment affirmed.

PATTERSON *v.* ATKINSON ET AL.

37 At. (R. I.) 532. 1897.

TILLINGHAST, J. The object of this bill is to reform a mortgage deed of personal property. The bill sets out, in substance, that by a mistake of the scrivener in drafting the mortgage deed in question, a part of the property which was mutually intended to be included therein was omitted; and also that said mortgage purports to convey the entire property described therein, when it was only intended to convey the mortgagor's interest in said property; and that, in order to make said mortgage deed conform to the actual intention of the parties, and to truly represent the contract entered into between them, it is necessary that it should be reformed. The bill prays that said mortgage deed may be reformed so as to give effect to the intention of the parties

[1] Following McNally *v.* P. Ins. Co., 137 N. Y. 389.

[2] The majority of the court held that a sale of the real estate, about ten days before the fire, by the sheriff under an execution against the firm, did not effect a change of interest, as, under the statute, the right and title of the judgment debtors were not devested, — they having fifteen months within which to redeem, and being entitled to possession during that period.

thereto, and for other relief. As to the power of a court of equity to reform such a mortgage deed of personal property, see Ryder *v.* Ryder, Index, RR. 23, 32 Atl. 919.

The respondent Coombs demurs to the bill on the grounds: (1) That it appears therefrom that the mortgage was given on partnership property belonging to the firm of Coombs & Atkinson, to secure the individual debt of said Atkinson, which, under the law, cannot be done; and (2) that it appears from the bill that said Atkinson owned only an undivided half interest in the machinery and goods and chattels mentioned and described, and that by attempting to convey the entire property he converted the same to his own use, and hence the mortgage is null and void.

The first and principal question raised by the demurrer is whether a co-partner can give a valid mortgage on partnership property to secure his individual debt. We think he can. Of course such a mortgage is subject to the prior equities of the partnership creditors, and also of the other partners. But whatever surplus remains to the credit of the partner giving the mortgage, after the affairs of the firm are settled, will belong to the mortgagee. 1 Bates, Partn. §§ 183, 184; Jones, Chat. Mortg. 2d ed. § 45; Thompson *v.* Spittle, 102 Mass. 207. See also Pars. Partn. 2d ed. § 100 *et seq.* In Randall *v.* Johnson, 13 R. I. 338, this court held that the interest of a co-partner in partnership property is attachable by an individual creditor of such co-partner, and also that in case of such an attachment the sheriff may seize a specific chattel, and deliver it to the purchaser of the interest attached, who, subject to the partnership debts and equities, thereby becomes a tenant in common of such chattel with the other partners. In Trafford *v.* Hubbard, 15 R. I. 327, the court affirmed the same doctrine. And if, against the will of a co-partner, his interest in co-partnership property may be attached by his creditor for his individual debt, we see no reason why such co-partner may not voluntarily secure a creditor by mortgaging his interest in the firm property. In speaking of the power of a co-partner to sell his interest in the firm property to a third person, Mr. Bates, in his valuable work on Partnership (volume 1, § 183), says that "such sale . . . is effectual to carry the right, after winding up, to such share of surplus as would otherwise have been due to the partner, in preference to other and unsecured individual creditors." The same doctrine is recognized in Bank *v.* Godwin, 5 N. J. Eq. 334. The cases cited by respondents' counsel in support of the demurrer, in so far as they are opposed to the doctrine above enunciated, were decided by courts where the right to attach partnership property for the private debts of an individual partner is not recognized because of its prejudicial effect upon the rights of the other partners; and hence, being opposed to the settled law of this State, and we think also to the weight of authority elsewhere, they are not controlling.

The second question raised by the demurrer is whether, by attempting to convey the entire property, as the mortgage on its face purports

to do, the mortgagor converted the same to his own use, and thus rendered the mortgage null and void. It is true that assuming to one's self the property and right of disposition of another's goods is a conversion thereof. And, of course, it is clear that in a case where a person gives a mortgage on property which does not belong to him, without the consent or knowledge of the owner, such mortgage is a nullity. But such is not the case here. The bill shows that the respondent, William J. Atkinson, at the time of the giving of the mortgage in question, was the owner of an undivided half interest in the property, which he mortgaged to the complainant. And, while the mortgage purports to convey the entire property described therein, yet this is alleged to have been caused by a mistake on the part of the scrivener; and the complainant is seeking by his bill to rectify this mistake. And if it turns out at the trial of the case that the mortgagor only intended to convey his undivided half interest in the partnership property, and that this was in accordance with the contract between him and the mortgagee, then the mortgage will not, in effect, be one conveying or attempting to convey property belonging to his co-partner, but only his individual interest therein, and hence will not be obnoxious to the objection aforesaid. The respondents' counsel seems to take the somewhat inconsistent position that, as the mortgage purports to be a conveyance of the entire property, it is to be taken at its face value, although the bill shows that it was not so intended; and by demurring to the bill the respondents admit that it was not so intended. As the bill sets out what sort of a mortgage was mutually intended to be given, we have to deal with that, for the purposes of the demurrer, instead of dealing with the one which appears to have been given.

Demurrer overruled.

STATE BANK OF LUSHTON *v.* O. S. KELLEY CO.

47 Neb. 678: 66 N. W. 619. 1896.

RAGAN, C. On the 8th day of May, 1891, Peter Peters and John Peters, by their order or contract in writing, purchased a threshing machine of the O. S. Kelley Company. The machine was to be delivered to them not later than the 20th of July of that year, and they were to pay for the same $585. Part of this payment was to be made in cash, on delivery of the machine, and the remainder to be evidenced by their notes secured by a chattel mortgage on the machine. The machine was delivered on the 23d of July, cash payment made, and John and Peter executed their joint and several promissory notes to the Kelley Company for the remainder of the purchase price of the machine, and at the same time executed to the Kelley Company a chattel mortgage on the machine to secure the payments of their notes. By mistake this mortgage was filed in the office of the county clerk of

York County, although the mortgagors resided in Hamilton County. On the 13th day of October, 1891, Peter Peters mortgaged the threshing machine to the State Bank of Lushton to secure a debt which he then, and had for some time, owed the bank. The bank subsequently took possession of the threshing machine under its chattel mortgage, and was proceeding to foreclose the same when the Kelley Company, by this action, replevied the threshing machine from the bank. The action was tried to a jury in the district court of York County, a verdict and judgment rendered for the Kelley Company, and the bank prosecutes to this court a partition in error.

1. On the trial the district court, at the request of the Kelley Company, instructed the jury as follows: "The jury are instructed that the law is that partnership effects cannot be released from liability for the unpaid debts of the partnership without the consent of every member of the firm. The *corpus* of partnership effects is joint property, and neither partner separately has anything in that *corpus*, but the interest of each is only his share of what remains after the partnership accounts are taken. In this case, if you believe from the evidence that Peter Peters and John Peters purchased of the plaintiff in this case the power and separator described in the plaintiff's petition, in partnership, to be used and operated by them in threshing, and as a part of the transaction the said Peter Peters and John Peters executed and delivered to the plaintiff the notes and mortgage described in the petition, and put in evidence by the plaintiff in this case, to secure the payment of the purchase price of the said outfit, then the plaintiff in this case would have the first lien upon the property in question to the amount unpaid upon said mortgage, and the said Peter Peters would have no right to execute a mortgage upon the said threshing outfit to secure his individual indebtedness, to the prejudice of the plaintiff in this case; and any mortgage so given by the said Peter Peters to secure his individual indebtedness would be subject to the mortgage of this plaintiff, regardless of whether plaintiff's mortgage was ever filed in the office of the clerk of the county or not."

The first assignment of error argued is directed to the giving of this instruction. The evidence shows that John and Peter Peters were farmers and brothers, residing in Hamilton County, at the time they purchased the threshing machine, and executed the notes and mortgage to the Kelley Company; that Peter Peters and a son of John Peters accompanied the machine from place to place, and used it in threshing grain. Whatever may be said of this instruction as an abstract proposition of law, we think it had no place in this case. It submitted to the jury the question as to whether John and Peter were co-partners, and there is no evidence whatever in the record which would justify the jury in making such a finding. Counsel for the defendant in error assume that, because John and Peter jointly purchased and jointly owned this property, therefore a partnership relation existed between them; but such a result by no means follows. They were rather joint owners, or tenants in com-

mon, so far as the record shows, of the property. In Waggoner *v.* Bank, 43 Neb. 84, it was held (following the definition given by Chancellor Kent) that, "Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." And in Iliff *v.* Brazill, 27 Iowa, 131, it was held that, "where two farmers buy in common a threshing machine, which they use and operate together, and for which they execute to the vendor a note signed by both individually, they are to be treated as joint owners, and not as partners." In Quackenbush *v.* Sawyer, 54 Cal. 439, it was held that, "a mere joint ownership in personal property does not constitute a partnership." To the same effect, see Wheeler *v.* Farmer, 38 Cal. 203; Hawes *v.* Tillinghast, 1 Gray, 289; Goell *v.* Morse, 126 Mass. 480; Moore *v.* Curry, 106 Mass. 409; Vose *v.* Singer, 4 Allen, 226; Donnan *v.* Gross, 3 Ill. App. 409; Sargent *v.* Downey, 45 Wis. 498; Cinnamond *v.* Greenlee, 10 Mo. 578; Ward *v.* Bodeman, 1 Mo. App. 272. We do not say that John and Peter were not partners, nor that the threshing machine was not partnership property; but what we do decide is that the mere fact that they jointly purchased, owned, and operated the threshing machine does not establish that a co-partnership existed between the joint owners, nor that the threshing machine was co-partnership property. So far as the record before us goes, John and Peter were joint owners — tenants in common — of the threshing machine, and the bank acquired a lien upon the interest of Peter Peters in the threshing machine, by virtue of the mortgage he made thereon. . . .

Judgment reversed.

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§ 4. Firm Title after the Death of a Partner.

HAMMOND *v.* JETHRO.

2 Brownlow, 99, note. 1611.

"Note that it was agreed by all the justices that by the Law of Merchants, if two Merchants joyn in trade, that of the increase of that, if one dye, the others shall not have the benefit by survivor. See Fitzherbert's *Natura brevium*, *Accompte*, 38 Ed. 3 (7). And so of two joynt Shop-keepers, for they are Merchants: for as Coke saith, there are four sorts of Merchants, that is, Merchant Adventurers, Merchants Dormants, Merchants Travelling and Merchants Residents, and amongst them all there shall be no benefit by survivor."

HAIG *v.* GRAY.

3 De G. & S. 741. 1850.

Suit by a surviving partner against a debtor to the firm for an account of the dealings between the defendant and the partnership. Defendant demurred for want of parties, the executor of the deceased partner not having been brought before the court.

Mr. Lee and *Mr. F. S. Williams*, in support of demurrer.

Mr. Russell and *Mr. Haig* were not called upon.

The Vice-Chancellor. I apprehend it to be generally true, that, a debt having become due to a partnership of two persons, one of them having died, and the debt being in its nature demandable by a suit in equity, the surviving partner may sue for it in equity (whether the amount is to depend on the result of an account or otherwise), without making the representative of the deceased partner a party. There may, however, be circumstances requiring a departure from this general rule; and the question is, whether there are here any such circumstances? One circumstance relied upon is, that of the executor of the deceased partner having written to the debtor with respect to the debt to accelerate its payment; but I do not think this sufficient to create an exception to the general rule. Another circumstance relied upon is, that the alleged debtor has himself filed a bill against the surviving partner, making the representative of the deceased partner a party to it. Assuming him to have been correct in taking that course, I think that it does not vary the right of the surviving partner to sue as he sues here.

Demurrer overruled, with costs.

NEHRBROSS et al. *v.* BLISS et al.

88 N. Y. 600. 1882.

Action to set aside a deed executed by the sheriff of Niagara County, to defendant Bliss, and to compel the sheriff to execute a deed to plaintiffs. The premises in question were bid off to plaintiffs' testator upon a sale under execution. Defendant Bliss redeemed the premises under a judgment recovered by him as surviving partner of the firm of Bliss & Pierce. A judgment in favor of the plaintiffs, entered upon the report of a referee, was reversed by the General Term, and the plaintiffs appealed.

Joseph V. Seaver, for appellants.

George Wing, for respondents.

Danforth, J. The appellants concede that the only question raised upon the trial was as to the effect of the papers filed for the purpose of redemption. And the precise objection, as indicated by the points

submitted by the learned counsel in support of this appeal, is that Seth P. Bliss is described therein as the redeeming party without words indicating that he is the survivor of himself and Pierce, as he is named in the judgment record under which he sought to redeem.

The proceedings are statutory, and it is to be conceded that words cannot be added to or omitted from the statute for any purpose, but on the contrary its language is to be construed strictly. The defendant claimed the right to redeem under section 1464 of the Code of Civil Procedure. He was, therefore, required to file in the county clerk's office, or deliver to the sheriff as evidence of his right: first, a copy of the docket of the judgment under which he claimed the right to redeem; second, if that right depends upon any assignment of the judgment, it must also be filed, etc.; and third, an affidavit made by him stating truly the sum unpaid upon the judgment.

The copy of docket furnished by the respondents described a judgment in which "Seth P. Bliss, as survivor of himself and Jerome Pierce, deceased," is plaintiff. It was accompanied by no assignment or other paper, save an affidavit attached thereto, which, so far as material to our present inquiry, is in these words: "Seth P. Bliss, being duly sworn, says that he is the owner and holder of the judgment mentioned in the foregoing copy of docket of judgment, and that there is due," etc. Upon the death of Pierce, the legal rights under the firm contracts or causes of action, and the sole right to collect the partnership debts, remained in the survivor, Viner's Abr., Partners D.; 1 Lindley on Partn., 505; Voorhis *v.* Child's Ex's, 17 N. Y. 354, and vested so effectually that upon his death it would have devolved upon his personal representative, and he alone could sue upon it. 1 Williams on Exr. 1585; Copes *v.* Fultz, 1 Sm. & Mar. 625. So if Bliss died after judgment, redemption could have been had, under section 1466, by the executor or administrator of Bliss.

The right to the cause of action, and to sue therefor, came to Bliss by survivorship, and that is indicated in the title of the judgment. But so completely was it vested that a demand against him in his own right might have been set off in diminution of his claim as surviving partner. Slipper *v.* Stidstone, 5 Term. Rep. 493, and conversely French *v.* Audrade, 6 Id. 582. It follows, therefore, that, as surviving partner, he might join in one action a count for a debt due him in his own right, and one due him as survivor. Adams *v.* Hackett, 27 N. H. 289. Or a plaintiff, in an action charging him in his own right, might recover a demand due from him individually, and another due from him as surviving partner. Richards *v.* Heather, 1 B. & Ald. 29. Therefore, although the action was in his name as survivor, it was his own, and he had the legal title to the judgment, as much so as if the cause of action had stood in his own right. Kemp *v.* Andrews, 1 Showers, 188, case 138; Murray *v.* Mumford, 6 Cow. 441; Daby *v.* Ericsson, 45 N. Y. 786. Consequently, it was *not* necessary for him as redeeming creditor to present any assignment of the judgment to himself, or

add to the statement in the affidavit any other words showing his identity with the judgment creditor. He was in law the owner of the judgment, and appeared to be so on the face of the papers. No other point needs consideration. The redemption, for aught that now appears, was made according to the letter of the statute, and the order appealed from should be affirmed with costs, and judgment absolute rendered in favor of the defendants and against the plaintiffs, pursuant to their stipulation.

Order and judgment affirmed.

PATTON *v.* CARR.

117 N. C. 176 : 23 S. E. 182. 1895.

FURCHES, J. Counsel, in their well-considered arguments, presented this case in several aspects; but we are of the opinion that a correct solution of the whole controversy depends on a few well-defined principles of commercial law and of equity.

C. H. Conrad and the plaintiff, Patton, were partners, doing a banking business in Danville, Va.; and Conrad, on the 17th of March, 1893, executed a note payable to the defendant, Carr, for $5,000, due four months after date, which Carr, at the request and for the accommodation of Conrad, indorsed. Soon thereafter Conrad presented this note at the banking-house of plaintiff and Conrad, and it was there discounted. Before the maturity of this note, Conrad died, intestate, leaving the plaintiff the only surviving partner of this partnership concern. Not long after the death of C. H. Conrad, and before the commencement of this action, one C. L. Holland was duly appointed and qualified as the administrator of said Conrad; and the plaintiff, Patton, as said surviving partner, commenced a suit in equity, in the city of Danville, Va., for a final account and settlement of said concern, for injunctive relief, and for a receiver, in which the plaintiff was appointed, and commenced this action, as surviving partner and receiver, against the defendant, Carr, as the indorser of said note.

Defendant, answering, admits that he indorsed the note; that he did so at the request of Conrad, and purely as a matter of accommodation to Conrad; that Conrad got the entire benefit of the proceeds of said note; and that he (Carr) was never benefited one cent thereby; that in no event can he be considered more than the surety of Conrad; that the said partnership concern of plaintiff and said Conrad was, and is now, entirely solvent; that, after paying all its debts and liabilities, there will be a surplus left in the hands of plaintiff to be paid over by him "to Chas. L. Holland, as administrator of Chas. H. Conrad, deceased."

In addition to the above allegations contained in defendant's answer,

he makes the bill of complaint of plaintiff in the court of Virginia, in which plaintiff was appointed receiver, and his reports to the court therein exhibits, and a part of his answer, from which it appears that said Conrad at the time of his death had $13,000 on deposit in said banking-house to his credit; that, since his death, $20,000 life insurance has been collected, and is now on deposit in said banking-house, which Conrad's administrator is claiming, but plaintiff is claiming that one-half of this should enure to the benefit of the firm; and that in plaintiff's report as receiver to the court of Danville, Va., it is shown that the assets of this partnership amounted to $300,289.12; that to all these allegations of fact contained in defendant's answer the plaintiff makes no reply or denial. Plaintiff and defendant, in addition to what has been stated, agree upon a state of facts, and among them are the following: "The partnership of W. F. Patton, Sons, & Co. [and this is the partnership of plaintiff and C. H. Conrad] is solvent, and the receivership aforesaid has not been wound up. There will be a surplus in the settlement of the receivership affairs of W. F. Patton, Sons, & Co. to be divided between the plaintiff, W. F. Patton, and the estate of C. H. Conrad, deceased. Said C. H. Conrad had $13,000 balance deposited to his credit in the bank of W. F. Patton, Sons, & Co. at the time of his death. His estate was then, and still is, solvent."

That defendant indorsed the note sued on for the accommodation of C. H. Conrad, and Conrad had it discounted at the banking-house of W. F. Patton, Sons, & Co., of which Conrad was a partner, and that Conrad got the benefit of the proceeds of the note, and Carr got nothing from the transaction, seem not to be disputed as facts. This in no view of the case could make Carr anything more than the surety of Conrad; and, these facts all being known to Conrad, the partner of plaintiff, in law were all known to plaintiff. 1 Bates, Partn. § 389. This presents a case in which Conrad was both payer and payee, and, so far as Conrad was concerned, never constituted what is known as a "legal" cause of action. Clement *v.* Foster, 3 Ired. Eq. 213. It could only be adjusted by the partners themselves, or in equity, upon a dissolution and settlement of the concern. Neither would it have been the subject of an action at law against the defendant by the firm, if Conrad were still living, as the note — the cause of action — would necessarily disclose the equity of the case. The death of Conrad, leaving the plaintiff survivor, does not change the law of the case, and does not authorize the plaintiff to bring an action which he and his co-partner would not have had a right to bring if he were living.

We think the plaintiff's cause of action — the note sued on — necessarily discloses the equitable jurisdiction of the case; but, if it does not, it is certainly raised by the defendant's answer, and must be determined upon equitable principles. It, therefore, being known to plaintiff that this is in fact the debt of his partner, C. H. Conrad, and that defendant, at most, is not more than Conrad's surety, he cannot

maintain this action against this defendant, either as surviving partner or as receiver, without alleging and showing his equities. 1 Bates, Partn. § 750. If he claims to sue as receiver, he should allege that Conrad's, the principal debtor's, estate is insolvent, and it is necessary to resort to defendant, Conrad's surety, for the benefit of creditors, as creditors have no interest in making the defendant pay Conrad's debt if the firm is solvent, which, of course, includes Conrad's individual estate. Nor is the plaintiff, as survivor, interested in making the defendant pay Conrad's debt if he has funds of Conrad in his hands, and partnership assets, sufficient, and more than sufficient, to pay the firm indebtedness, and to pay him his part of the partnership profits. Indeed, it would be unjust and inequitable to do so if he could. . . .

It will not be understood from what we have said in discussing the facts of this case that a survivor may not ordinarily sue an indorser, where there is no connection of the principal in the note with the partnership.

There is error.

MADDOCK'S ADMX. *v.* SKINNER ET AL.

93 Va. 479 : 25 S. E. 535. 1896.

SUIT in chancery by Skinner, for himself and other execution creditors of George M. Evans, to subject Evans' interest in the late partnership of Maddock & Evans to the payment of their executions. The bill charged that there was a fund of several thousand dollars, in the hands of certain attorneys, which belonged to the late firm, and that J. M. Gambill & Co. had a debt against the firm, but not enough to consume the firm assets. By the report of a commissioner, and the decree of the Hustings Court, the Gambill debt was to be paid in full out of the firm assets, and the balance to be divided in two equal parts, one of which was to be paid to Maddock's administratrix, and the other applied, so far as need be, to the payment of certain executions against Evans.

S. Griffin, for the appellant.

Robert E. Scott, for the appellees.

RIELY, J. . . . The appellant excepted to the report of the commissioner, because he allowed the claim of Gambill & Co. as a subsisting judgment against Maddock & Evans, without any proof (it was alleged) that there was such a judgment against the firm, and because the evidence showed that, if any debt was due, it was the personal debt of Evans, and not a debt of the firm. The court overruled the exception, confirmed the report, and decreed, as we have seen, the payment of the judgment out of the assets of the firm. This action of the court constitutes the only other assignment of error. It is to be observed that the exception did not deny that there was such a judgment, but simply claimed

that it was allowed without any proof. The report of the commissioner was made in obedience to the decree of the court, and, except for error apparent on its face, it was to be taken as *prima facie* correct, unless steps were taken to place before the court the evidence on which it was based, or it was shown, by the deposition of the clerk of the court in which the judgment was alleged to have been recovered, or otherwise, that there was no such judgment. This was not done. The commissioner stated that his report was made up from certain depositions, and "from the records of the clerk's office of your honor's court." It does not appear that he was directed by the court, or requested by the appellant, to return the evidence on which he reported the judgment. It was not his duty to do so, unless so directed or requested; and, the appellant not having taken steps to bring the evidence before the court, it could not review the finding of the commissioner, and the exception could not avail her. Shipman *v.* Fletcher, 91 Va. 473, 478; Saunders *v.* Prunty, 89 Va. 921; Bowden *v.* Parish, 86 Va. 67.

It appears from the deposition of J. M. Gambill that Evans, on account of his indebtedness to the firm of Maddock & Evans for certain mules, carts, and tools belonging to it, had assumed to pay the debt to Gambill & Co., and that he and Maddock approached the latter with the view of having them release Maddock from the debt, on condition that Evans would secure the debt by a deed of trust on the said property, which was worth about $2,000. Gambill & Co. agreed to do so, upon the condition being complied with. Evans returned the next day, and declined to give the deed of trust. The desired release was for the benefit of Maddock, and the duty was upon him, and not upon Gambill & Co., to see that Evans complied with the condition on which they had consented to release him. As Evans refused to secure the debt by deed of trust, the firm of Maddock & Evans continued liable for it.

The evidence establishes, however, that Evans was indebted to the partnership for the mules, carts, and tools, and that he had assumed, on account of such indebtedness, to pay the judgment of Gambill & Co. The partners evidently considered that the interest of Maddock in the property was at least equal to the amount of the judgment, and it clearly appears that the share of Evans in the undivided assets is sufficient to discharge it. If the judgment has now to be paid out of the assets belonging to the firm, as it must be, then Evans should be charged, in a proper settlement of the partnership, with such an amount, for the mules, carts, and tools, as would make the interest of Maddock therein equal to the judgment, or (which is the same thing, and prevents circuity) the estate of Maddock should receive out of the assets of the firm, after the payment of the judgment, a sum equal to the amount of the judgment, so as to adjust properly the accounts of the partners with the partnership and between themselves, before there is any division of the assets between the partners.

It was not questioned that, ordinarily, this would be the proper course; but it was contended that, inasmuch as individual creditors of Evans had obtained judgments against him, and sued out executions, they thereby acquired a lien on the share of Evans in the assets of the partnership remaining after the payment of the debts of the firm superior to the right of Maddock to have such settlement of the accounts between the partners and a distribution of the assets in accordance therewith.

Partners are joint tenants of the property of the partnership. Neither partner has an exclusive right to any part of the property until all of the debts of the partnership are paid, including the debts which may be due from the partnership to either of the partners. The interest of each partner in the property of the partnership is his share of the surplus after all the firm debts are paid and a balance of accounts is struck between the partners. It is thus that his interest is ascertained; and it is only this interest, so ascertained, that is subject to the lien of the execution or attachment of an individual creditor. The law does not permit the separate creditor to obtain more than the partner, who is his debtor, is entitled to. Christian *v.* Ellis, 1 Grat. 396; Diggs' Adm'r *v.* Brown, 78 Va. 295; Shackelford's Adm'r *v.* Shackelford, 32 Grat. 481; Taylor *v.* Fields, 4 Ves. 396; Dutton *v.* Morrison, 17 Ves. 193; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Buchan *v.* Sumner, 2 Barb. Ch. 165; Menagh *v.* Whitwell, 52 N. Y. 146; Phillips *v.* Cook, 24 Wend. 389; Pierce *v.* Jackson, 6 Mass. 242; U. S. *v.* Hack, 8 Pet. 271; Maxwell *v.* City of Wheeling, 9 W. Va. 206; Sirrine *v.* Briggs, 31 Mich. 443; Smith *v.* Evans, 37 Ind. 526. See also Story, Partn. §§ 261-263, 311; 2 Colly. Partn. (6th ed.) § 793, and notes thereto; 1 Bart. Ch. Prac. 618, 619; and 3 Minor, Inst. (2d ed.) pt. 2, p. 692.

In Pierce *v.* Jackson, *supra*, Parsons, C. J., said: "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it, but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe the firm. Consequently, all the debts due from the joint fund must first be discharged before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution." In Nicoll *v.* Mumford, *supra*, Chancellor Kent said: "The interest of each partner is his share of the surplus, subject to all partnership accounts; and that interest or surplus only is liable to the separate creditors of such partner, claiming either by assignment or under execution." In Menagh *v.* Whitwell, *supra*, Rapallo, J., said: "Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts

and settlement of all accounts." In Atkins *v.* Saxton, 77 N. Y. 195, 199, the same judge, discussing the right of a purchaser of the interest of a partner in partnership property at a sale under an attachment or execution against such partner for his individual debt, said: "He takes it subject to the rights of the co-partners of the debtor and the creditors of the firm, and subject to an accounting which may disclose that he derived no beneficial interest from his purchase. All that he can ultimately obtain is the debtor's share of such surplus as may remain after payment of the firm debts and the adjustment of the accounts of the partners as between themselves." And in Haynes *v.* Knowles, 36 Mich. 407, 410, Campbell, J., said: "The partner not sued cannot, on any principle of justice, be placed in any worse condition by a creditor of the partner than he could have been by his own partner."

It was error, therefore, in the Hustings Court, to distribute any part of the share of George M. Evans in the undivided assets of the partnership, remaining after satisfying the judgment of Gambill & Co., to the separate creditors of Evans, until the payment of a sum equal to the amount of the judgment had been decreed to the estate of Maddock, to which sum he was entitled, according to the evidence, out of the firm assets, on account of the indebtedness of Evans to the partnership, and which the latter, in the lifetime of Maddock, had assumed to pay. Its decree must therefore be reversed, and the cause remanded to the said court, with directions to distribute the moneys in the hands of the said attorneys upon the principles herein declared.

Reversed.

EMERSON *v.* SENTER ET AL.

118 U. S. 2. 1885.

Harlan, J. The court below proceeded upon the ground, in part, that a sole surviving partner of an insolvent firm, who is himself insolvent, cannot make a valid assignment of partnership assets for the benefit of joint creditors, with preference to some of them. We are unable to concur in this view.

Some of the cases hold that one partner cannot, either during the continuance of the partnership, or after its dissolution by agreement, make such an assignment. It cannot, however, be doubted that, in the absence of a statute prohibiting it, such an assignment, whether during the continuance of the partnership, or after its dissolution by agreement, would be valid when the partners all unite in executing it, or when one of them executes it by the direction or with the consent of the others. Partnership creditors have no specific lien upon the joint funds for their debts. 3 Kent, Com. 65; Story, Partn. § 358. They have no such relations with the partnership as entitles them to inter-

fere with the complete control of the joint property by the partners during the existence of the partnership, or with the right, after dissolution by agreement, of the partnership to dispose of it for the payment of their joint debts, giving such preference as they deem proper.

When the partnership is dissolved by the death of one partner, the surviving partner is entitled to the possession and control of the joint property for the purpose of closing up its business. Wickliffe *v.* Eve, 17 How. 467; Shanks *v.* Klein, 104 U. S. 18. To that end, and for the purpose of paying the joint debts, he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and, by sale or other reasonable disposition of its property, make provision for meeting its obligations. He could not otherwise properly discharge the duty which rests upon him to wind up the business, and pay over to the representative of the deceased partner what may be due to him after a final settlement of the firm debts. It is true that, in many cases, where, for instance, the surviving partner is not exercising due diligence in settling the partnership business, or is acting in bad faith, the personal representative of the deceased partner may invoke the interference of a court of equity, and compel such a disposition of the partnership effects as will be just and proper; this, because, as between the partners, and, therefore, as between the surviving partner and the personal representative of the deceased partner, the joint assets constitute a fund to be appropriated primarily to the discharge of partnership liabilities, though not necessarily, and under all circumstances, upon terms of equality as to all the joint creditors. But while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partner — there being no statute forbidding it — could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference — the local law not forbidding it — cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner. . . . *Judgment reversed.*[1]

[1] In Williams *v.* Whedon, 109 N. Y. 333 (1888), it is said: "The survivors do not take such assets as trustees, but, as survivors, hold the legal title subject to such equitable rights as the representatives have in the due application of the proceeds. . . .

DEWEY *v.* CHAPIN ET AL.

156 Mass. 35. 1892.

KNOWLTON, J. The master found that the partnership property sold by the defendant, Charles E. Chapin, the surviving partner, was worth at the time of the sale $4,729, although it brought at auction only $2,571.90. This was a finding of fact to which no exception was taken, and it appears to have been well supported by the evidence. If the sale had been made in good faith, and in the exercise of a sound discretion, the partner making it would have been chargeable only for the proceeds of it. But it was his duty to obtain for the property all that he reasonably could, for the benefit of the executor of his deceased co-partner, as well as for himself, and while he held the legal title, he held it subject to a kind of trust which equity will enforce in favor of those interested in it. About a month before the sale, he had obtained a lease of the place where the property was being used, which had previously been occupied by the firm, and there was no sale or offer of sale of the good will at the auction, or of any rights to remain on the premises, or to retain the plant and equipment there. He made the sale to his son, and, when it was completed, entered into partnership with him, and continued to conduct the same business, using the same plant and equipment at the same place. These facts warranted the finding of the master that the defendant, Charles E. Chapin, did not exercise good faith and sound discretion in endeavoring to obtain for the partnership property as much as he reasonably could, and he is therefore chargeable with what he ought to have got for it.

The defendant, Charles T. Chapin, was not a co-partner in the original firm, and is not accountable for any part of the assets of it, unless he became so through his purchase at the auction sale. The master finds that "neither fraud nor unfair dealing is imputable to him in that purchase," and that "the title passed to him;" but he also finds "that his relations both to the deceased and surviving partner subject him to any equity enforceable against the latter, and prevent his claiming to hold the plaintiff's property as a purchaser, without notice, for the price it was sold to him." This last finding does not enable the plaintiff or the other defendant to recover of him, on account of his purchase, anything more than the purchase price, and does not put him in the position of the surviving partner, who is accountable for

It was never in the contemplation of the contract of partnership that strangers, as the representatives of a deceased partner are, should have a voice in the determination of questions relating to the distribution of the firm assets among its creditors. They have the right to require them to be applied upon the firm debts, but if they are insufficient to pay such debts in full, they have no interest in the question, whether the deficiency shall be payable to one creditor, rather than another. . . . If the firm is insolvent, neither the assent of the representative, nor the statute regulating the distribution of a deceased person's estate, can legally affect the power of a survivor to make such assignment."

the partnership assets at the price which he ought to have obtained for them. The allegations of the bill and the findings of the master put his liability solely on the ground of his purchase. The plaintiff, in his case against Charles E. Chapin, seeks to hold him on the ground that, by the sale, he made a final disposition of the property, and so made himself accountable for its value. The claim against him is inconsistent with an attempt to pursue the assets beyond him, and to recover them from Charles T. Chapin. If the plaintiff charged an improper and fraudulent sale by Charles E. Chapin, and asked on that account for the appointment of a receiver, and showed that Charles T. Chapin bought with notice of the plaintiff's equities, and that the sale could not properly be made, it might well be that a receiver could be authorized to take the property out of Charles T. Chapin's hands, or that he could be compelled to pay the value of it if he had sold it to an innocent purchaser or otherwise disposed of it. But under this bill we are of opinion that no recovery can be had against him, and that Charles E. Chapin is liable to the plaintiff for the whole amount found due him by the master. *Decree accordingly.*

PECKHAM, J., IN RUSSELL *v.* McCALL ET AL.

141 N. Y. 437: 36 N. E. 498. 1894.

THE defendant claims that the executrix of Miss Russell, by commencing her action against the surviving partner to recover the decedent's share of the partnership assets, and in prosecuting the same to judgment, is barred from suing the surviving partner again, and joining with him Mrs. McCall, upon the same cause of action. It is now asserted by counsel for defendant McCall that when the other action was commenced the executrix knew all the facts connecting McCall with the misuse or misappropriation of the assets of the partnership. . . . For the further discussion of this point, we will assume full knowledge on the part of the executrix of all the facts at the time she commenced her action against the survivor. In that case, we think there was no election of inconsistent remedies such as should bar this action.

Upon the death of Miss Russell, the surviving partner, Moschowitz, had certain powers, rights, and obligations granted to and placed upon him by reason of such death. He had the legal title to the assets, and he held them as the legal owner, and not as trustee, in the strict sense of that term. In equity, however, he was to be regarded, to some extent, as a trustee; and his duty was to pay the debts, and dispose of the assets of the partnership for the benefit of himself and the estate of the deceased partner. Case *v.* Abeel, 1 Paige, 393; Williams *v.* Whedon, 109 N. Y. 333; Preston *v.* Fitch, 137 N. Y. 41, 56.

The position is somewhat anomalous, — not exactly and wholly a

trustee, and yet not a full owner of the assets which he takes or retains possession of by reason of survivorship. The duties spoken of he owes the estate of the deceased partner; and when, instead of gathering in the assets, paying the debts, winding up the business, and distributing the surplus, he misappropriates the same, and converts them to his own use, and that of others with him, he is so far guilty of a breach of trust that a court of equity will, when called upon, intervene and give appropriate relief. This was the object of the first action. The court was asked to decree an accounting, and, as a ground for the request, it was alleged that the defendant was violating his duty, converting the assets to his own use in his own business, and failing to apply them to the payment of the debts of the partnership. Judgment was asked for the amount which might be found due upon such accounting. . . .

But this kind of a judgment is not in the least inconsistent with the right to pursue other wrongdoers, who, by intermeddling with the property and assets of the estate, have rendered themselves liable as trustees *de son tort* for the wrong done. 1 Perry, Trusts, § 245; Flockton *v.* Bunning, reported in note to Vyse *v.* Foster, 8 Ch. App. 309, at 323; Lindl. Partn. 531.

The survivor of the partnership did not become the full and absolute owner of its assets, upon the entry of the personal judgment against him, nor was there any election on the part of the plaintiff, by reason of that fact, to look only to the one wrongdoer, when there were others equally liable. If the personal judgment were paid, then, indeed, the plaintiff's rights and equities in the property would be changed, and he would be precluded from any further claim upon it. Until satisfaction of that judgment, however, the plaintiff could not be barred from further efforts to obtain relief against other wrongdoers. . . . That McCall, by taking this property, and applying it, with the surviving partner, to his own uses, with knowledge of its character, and without paying any consideration therefor, can be properly treated as a wrongdoer and trustee *de son tort*, and be made liable in an equitable action for his acts, is, as it seems to me, undoubted. Vyse *v.* Foster, 8 Ch. App. 309, 323; Flockton *v.* Bunning, note to above case, at page 323; Perry, Trusts, § 245; Hooley *v.* Gieve, 9 Abb. N. C. 8; *In re* Jordan, 2 Fed. 319; 2 Pom. Eq. Jur. 1079.

GALBRAITH ET AL. *v.* TRACY ET AL.

153 Ill. 54: 38 N. E. 937. 1894.

Baker, J. For a number of years Jesse Kemp and John J. Kemp carried on the business of raising and dealing in live stock in partnership. The stock, machinery, implements, and other personal property employed in such business were partnership property. The 400 acres

of land on which the business was conducted stood in their joint and joined names, and was presumably purchased for the purposes of the partnership business, and seems to have been used and regarded by them as partnership property. When John J. Kemp died, Jesse Kemp, the surviving partner, became a trustee in respect to the property and assets of the late partnership. In equity, a surviving partner is treated as a trustee, with the fiduciary relation of trustee and *cestuis que trustent* existing between him and the representatives of the deceased partner. There is a conflict in the authorities upon this point, but in this State the law is as stated. Nelson *v.* Hayner, 66 Ill. 487; 17 Am. & Eng. Enc. Law, pp. 1154, 1155, and cases cited in notes. Jesse Kemp, the surviving partner, filed in the county court an inventory of the real and personal estate of the late partnership under oath, and in it was a schedule of the lands here in question. Then Jesse Kemp died, and Franklin Galbraith became administrator of his estate, and assumed and undertook the administration of the trust in respect to the partnership property. Among other things, he reported to the county court that there was "property in his hands of the late firm of John J. and Jesse Kemp, of which partnership said Jesse Kemp was the survivor," and he applied for and obtained an order for the sale of all the personal property contained in the inventory and appraisement bill, stating it was the property "of said late firm;" and he realized from the sale thus made the sum of $1,341.12.

In the event of the death of both the partners before the settlement of the partnership affairs, the administrator of the last survivor stands in the shoes of his intestate, and he is charged with the duty of completing the settlement as a trustee, the relation between him and the legal representatives of the partner first deceased being that of trustee and *cestuis que trustent.* Dayton *v.* Bartlett, 38 Ohio St. 357; Thomson *v.* Thomson, 1 Bradf. Sur. 24; Brooks *v.* Brooks, 12 Heisk. 12; 17 Am. & Eng. Enc. Law, 1158. In equity the real estate of a partnership is regarded as, and stands on the same footing with, personal property, no matter in whom the legal title may be vested. Bopp *v.* Fox, 63 Ill. 540; Simpson *v.* Leech, 86 Ill. 286; Trowbridge *v.* Cross, 117 Ill. 109; Alkire *v.* Kahle, 123 Ill. 496. But whatever remains of it after the partnership debts shall have been discharged is held in common by the heirs, subject to dower, or goes to the devisees. Strong *v.* Lord, 107 Ill. 25.

It is urged that Franklin Galbraith, administrator of Jesse Kemp, took no interest in the lands, only a power to sell them for the payment of debts, and that, therefore, no duty devolved upon him to redeem the lands from the sales made by the master in chancery, and that after the expiration of the time allowed by law for the redemption of the lands to the widows and children of Jesse Kemp and John J. Kemp, if not before, he had the right to purchase the certificate of sale or buy the lands. This claim is inconsistent with the position he occupied as trustee in respect to the partnership property. Besides this, it was

expressly held in McCreedy *v.* Mier, 64 Ill. 495, that an administrator is not a stranger in all respects to the real estate of his intestate; that it is under some circumstances his duty to redeem from a sheriff's sale; and that under the facts of that case he became trustee for the heirs. The case was quite like the case at bar. The administrator procured an assignment of the certificate of purchase to be made to his brother. This court said: "It is plain that the same principle which forbids him to become a purchaser at a sale under order of court must forbid him to buy on his own account a certificate of purchase given by the sheriff or master on a sale made in the lifetime of the deceased."

It is urged that only $1,341.12 came to the hands of Franklin Galbraith, the administrator, in money; that such sum was wholly insufficient to redeem from the $3,000 mortgage, the two $500 mortgages, and pay the claims against the estate, and costs and expenses of administration. The 160 acres in section 34 sold for $1,241; the other four tracts were sold separately, — one for $1,780, one for $324, one for $670, and one for $1,340; and in order to redeem one tract it was not necessary to redeem all. The total sum called for by the five certificates of purchase was $4,907.69. Deducting therefrom the $1,341.12 in money would leave only $3,566.57, plus interest to time of redemption, to be arranged for in order to redeem all the land from the mortgage sales. The lands were worth from $12,000 to $14,000, a value more than three times, and almost four times, the amount of the required sum. It is almost certain that Galbraith, with the business and financial ability that this record indicates that he possessed, could readily have arranged through the unsecured creditors, or otherwise, to save the whole or some portion of the 400 acres of land to the two widows and their children, if he had felt so inclined. As for the widows and children, they had no money or means or business capacity. Even if it should be said that the record does not justify these surmises and conclusions, yet that would make no difference in the decision of this case. A trustee is not allowed to put himself in a position in which to be honest must be a strain on him. Staats *v.* Bergen, 17 N. J. Eq. 554; Tyler *v.* Sanborn, 128 Ill. 136. The very next day after the right of the widows and heirs to redeem from the sales under the $3,000 mortgage had expired, the trustee purchased the four certificates of purchase from Moir, and immediately upon the expiration of the statutory 15 months he received a deed from the master in chancery, and at once took possession of the 240 acres of land. In the county court he waived process, and entered his appearance, and raised no objections, and allowed judgments to be entered on the Moir and Peterson claims. Then Moir and Peterson redeemed the 160 acres in section 34 from Priscilla Trimmer, and, there being no bid over and above the redemption money, they forthwith received the deed from the sheriff. That deed bears date December 5, 1885; and nine days thereafter, on December 14, 1885, they conveyed to Galbraith, the trustee, he paying the amount of the redemption money, and the amounts of

their respective claims against the Kemps. As a matter of course, this whole thing was prearranged. It cannot, in reason, be deemed otherwise. We forbear to enter into any discussion of the evidence tending to prove that Galbraith and others took steps to prevent any competition at the sale made by the sheriff, and other like matters. Galbraith, the trustee, got the whole of the lands at just half of their then actual value. It is unnecessary to consider much, if any, of the oral testimony that was taken at the hearing other than that in regard to values. The quiet records of the county and circuit courts, and those that rest in the recorder's office, though they are dumb, yet they speak; and they establish the cases of the complainants in the two cross bills. . . .

Affirmed.[1]

RICHARDSON ET AL. v. REDD ET AL.

118 N. C. 677: 24 S. E. 420. 1896.

FURCHES, J. A. J. Boyd, S. H. Boyd, G. D. Boyd, and Mrs. T. A. Richardson were the individual members composing the partnership of the Boyd Manufacturing Company. A. J. Boyd is dead, and the partnership is insolvent. The Bank of Reidsville has recovered a judgment against the concern for a partnership debt, sued out execution, and is trying to enforce its collection by a sale of the partnership property. S. H. Boyd and G. D. Boyd each claim their personal property exemptions out of the partnership effects, and have each assented to the other's doing so. But Mrs. Richardson and the administrator of the deceased partner object, and the question is, can S. H. Boyd and G. D. Boyd take their personal property exemptions out of the partnership effects, against the consent of Mrs. Richardson and the administrator, Redd? It has been repeatedly held by this court that one partner is not entitled to this exemption without the consent of his copartners. Stout v. McNeill, 98 N. C. 1; Scott v. Kenan, 94 N. C. 296; Burns v. Harris, 67 N. C. 140.

[1] In Needham v. Wright, 140 Ind. 190: 39 N. E. 510 (1895), it is said: "Neither was the plea correct in concluding that on the dissolution of a partnership, whether by death or otherwise, the partners become tenants in common of the partnership property. It is true that in Stair v. Richardson, 108 Ind. 429, there is an inadvertent expression to the effect that, 'after dissolution, former members are tenants in common.' The statement was unnecessary to the decision of that case. Surviving partners are rather joint tenants than tenants in common. They are trustees for the winding up of the affairs of the partnership, and all the property of the firm goes to the survivors pending settlement. It is only after payment of all debts and obligations of the firm by the surviving partners that the residue is distributed to the several members and to the representatives of deceased members. Bates, Partn. §§ 183, 685-687. See also Roberts v. McCarty, 9 Ind. 16; Nicklaus v. Dahn, 63 Ind. 87; Railway Co. v. Adamson, 114 Ind. 282. It is only by the appointment of a receiver that the settlement of partnership affairs can be taken out of the hands of the surviving partners."

These authorities dispose of the case, unless there is some reason for distinguishing it from the cases cited. This the defendants S. H. and G. D. Boyd undertake to do by saying that A. J. Boyd is dead and cannot claim his exemption, nor can he give his assent to their doing so, and that Mrs. Richardson is a married woman now, and was at the time of the formation of this partnership, and was not and is not a free trader; that on account of this disability she was not then, and is not now, capable of contracting; that, this being so, her individual estate needs no protection against the creditors of the partnership; that in fact she is not a partner, and never has been, although she put $5,000 in the concern, and was considered and treated as a partner. It does not become necessary that we should determine the relation of Mrs. Richardson to this concern, further than to say that it appears from the case that she put $5,000 into the partnership, and must have some interest, and it hardly lies in the mouths of those who have dealt with her as a partner to set up her coverture for their benefit.

We have discussed Mrs. Richardson's relation more than was necessary, for the purpose of showing that the reasoning of defendants, as to why she need not object, that she needs no protection for her individual estate against the creditors of the firm, does not apply to the estate of A. J. Boyd. And, when it comes to a consideration of his interest, it is contended that his estate cannot be protected, because he is dead, and can neither object nor assent. This is a right ingenious way of working the thing out. But it would be "to stick in the bark," and to abandon the principle upon which the rule has been established, to sustain the contention of these defendants, that, although the partnership was dissolved by the death of A. J. Boyd, still his estate (his administrator) has the same interest in its effects, and is under the same obligation to its creditors, that A. J. Boyd was when living.

And if the rule was founded upon the principle of equitable lien that a partner has in the partnership effects, as is stated in Stout *v.* McNeill, *supra*, the estate (the administrator of A. J. Boyd) is as much interested in having the partnership assets applied to the satisfaction of the partnership debts as A. J. Boyd would be if living. So it is plain to see that the reason of the thing is against the claim of these defendants. But if we should not be governed by the reason and spirit of the law, as we think we should, but conclude to "stick in the bark," and be governed by the letter of the law, we find these defendants in no better condition. The rule is that they are not entitled to this exemption "without the consent of the other partner or partners," and it is certain that A. J. Boyd has not given his consent to the allowance of these exemptions. The defendants S. H. Boyd and G. D. Boyd are not entitled to the exemptions claimed.

Affirmed.

LINDNER *v.* ADAMS COUNTY BANK ET AL.

49 Neb. 735: 68 N. W. 1028. 1896.

IRVINE, C. The record in this case discloses that the Adams County Bank brought the action against Abraham Loeb and wife, Lindner, the administrator, Rosa Hirsch, the widow, and Benjamin and Jacob Hirsch, the heirs, of Samuel Hirsch, deceased, to foreclose a mortgage executed by Loeb and Samuel Hirsch in favor of the bank. The case proceeded to foreclosure and sale, and after satisfying the bank's debt there remained a large surplus, one-half of which was afterwards, by the court, ordered paid to the guardian of the heirs of Samuel Hirsch. The present controversy relates to the disposition of the remainder of the surplus, it being claimed on one hand by an assignee of Loeb, and on the other hand by the administrator of Hirsch. The district court made an order directing its payment to William Kerr, the assignee of Loeb. This order was made on consideration of the application and the record in the case, without evidence; and the question presented for review is substantially, therefore, whether the administrator's application, taken in connection with facts established by the record, was sufficient, if the allegations contained in the application were true, to entitle him to the unpaid surplus. The application alleges, in brief, that Loeb and Samuel Hirsch were, in the latter's lifetime, partners, and that the real estate sold under the decree of foreclosure was partnership property; that, after the death of Hirsch, Loeb collected the rents and profits of the real estate, and continued to carry on the business and collect debts due the partnership, but failed to pay the debts of the partnership, and had refused to apply moneys coming into his hands for the purpose of discharging such debts, but had converted the partnership property to his own use; that the partnership owned property largely in excess of its liabilities; that Loeb is insolvent; that, on an accounting between Loeb and Hirsch's administrator, Loeb would be indebted to the latter in at least $3,000.

In the briefs many questions are discussed with regard to the rights of surviving partners, and the propriety of an examination into their transactions, and an accounting, in a proceeding of this character. We think, however, a single principle controls the decision of the case. The assignment of the surplus arising from the sale from Loeb to Kerr was made before the sale was confirmed. It recites a consideration of $1,250 paid by Kerr to Loeb. Its legal effect was as an assignment of a chose in action belonging to a partnership, by the surviving partner, to a stranger. Neither by any averment in the administrator's application for the surplus, nor elsewhere in the record, is the *bona fides* or consideration of this assignment attacked. On the dissolution of a partnership by the death of one of the partners, the partnership property vests in the survivor, in trust, it is true, for the settlement and winding up of the partnership business, but nevertheless with

power of disposition for that purpose; and the surviving partner may, in such case, convey or transfer the property to a stranger, who will take title by virtue of such conveyance or transfer. Fitzpatrick *v.* Flannagan, 106 U. S. 648. Not only may tangible property be so transferred by a surviving partner, but also choses in action. Johnson *v.* Berlizheimer, 84 Ill. 54; Roys *v.* Vilas, 18 Wis. 169; Daby *v.* Ericsson, 45 N. Y. 786; Bohler *v.* Tappan, 1 Fed. 469. It follows from this principle that the assignment by Loeb, the surviving partner, to Kerr of any surplus that might remain after satisfying the decree in favor of the bank (such assignment being unimpeached) operated to transfer the right of the partnership to such fund to Kerr, and it remained no longer a partnership asset. So that the question as to whether, in the absence of such an assignment, an accounting might be had in this action between the surviving partner and the personal representative of the deceased partner, and the surplus distributed in accordance with the result of such accounting, is not material to the present case.

A case much in point is Willson *v.* Nicholson, 61 Ind. 241. That was an action on a promissory note made to a partnership, which had been assigned by delivery to the plaintiff by the surviving partner. Certain creditors of the partnership had filed counterclaims, alleging insolvency of the firm and of all its members, and that the note in suit constituted the firm's only assets, and that the plaintiff had purchased it with full knowledge of the facts. They prayed that the proceeds of the instrument should be applied to the payment of their claims. The supreme court affirmed the action of the trial court in striking out the counterclaims, on the ground that the surviving partner succeeded to the assets, and had the right to dispose thereof, and that, in the absence of any allegation to the contrary, it would be presumed that the assignment to the plaintiff was *bona fide*, and for a valuable consideration.

Affirmed.

RAGAN, C., not sitting.

EX PARTE MANCHESTER BANK. IN RE MELLOR.

12 Ch. Div. 917. 1879.

J. H. MELLOR and his son, J. W. Mellor, were in partnership under articles which provided that the machinery and stock-in-trade should belong to the father, and not form part of the capital of the firm. The father died, having by will empowered, but not directed, his executors to continue his business. Two of the executors, the son and widow, continued the business, the third executor being cognizant but not acting. At the testator's death the old firm were indebted to a bank, who in their books wrote off the old debt and debited the new

firm with the amount. The new firm went into liquidation. At this date there were assets in possession of the new firm *in specie*, such as machinery, which had been employed in the old firm. The bank asked to have these assets applied to its claim against the old firm, while the creditors of the new firm asked to have all the assets distributed as the property of the new firm. An issue was directed in which the liquidation trustee should be plaintiff and the bank defendant, to decide whether the trustee or the bank was entitled to the proceeds of such old firm property. The trial resulted in a verdict for the plaintiff, and the defendant appealed.

Herschell, Q. C., and *Smyly*, for the appellant.

Ambrose, Q. C., and *Finlay Knight*, for the trustee.

BACON, C. J. The question is purely one of administration in bankruptcy. Mr. Mellor and his son carried on business together. Mr. Mellor being the capitalist, and the owner, if not of all, certainly of the larger part of the joint property. Mr. Mellor died. What was the state of things then? Mr. Mellor could not by his will, nor by any act that he had done in his lifetime, withdraw from the partnership any part of that joint estate until the joint debts of the partnership were paid. The right of a partner to withdraw from the partnership is always subject to the equitable right which the co-partner has to see that all the debts are paid.

In administrations in bankruptcy it must always be borne in mind what are the equitable rights of the partners *inter se*, because the decision of that question governs all that can flow from the transaction. . . . The question before me is simply one of administration in bankruptcy, as I have said. At the date of Mr. Mellor's death a large amount of joint debts was due, and they are all paid, it seems, but one. Upon Mr. Mellor's death, there being a certain authority contained in his will to his executors to carry on his trade with a partner if they thought fit, in some sort of helter-skelter way, without articles of partnership and without any agreement from which I can draw any just conclusion, the widow and son carried on the business and have become bankrupt. It is said that the partners in the new firm, acting upon some authority in the will, made out a balance-sheet. If so, they made it out for their own purposes only. They put a certain assumed value upon the joint assets, and on the opposite column they placed what they believed to be the joint debts. I have not to examine that; it is a matter of no kind of importance, which affects nobody, and certainly does not affect the case. They carried on their business in this way. The surviving partner, who had the right to have every shilling of the joint estate applied in payment of the joint debts, writes to the bank, saying: "We have begun a new partnership; my mother and I are carrying on the business; you will accept her signature to the checks she draws upon you." So it goes on, and the bank remains a joint creditor of the old firm down to the present time, when the new firm becomes bankrupt; and I have in bankruptcy to admin-

ister the assets which are found in the possession of that new firm. These assets are joint estate remaining *in specie;* it is not a question of money, as in *Ex parte* Richardson, Buck, 202, and the other cases in which sums of money were taken from the testator's estate. Can there be any doubt that the persons who answer the description of joint creditors are the persons who are first entitled to this estate? . . .

Ex parte Morley, L. R. 8 Ch. 1026, was referred to. In that case the point now in discussion was decided. The elder Morley died, and the joint estate became vested in the elder Morley's executors. The son carried on the business, no matter under what authority, and became bankrupt. The decision of the court in *Ex parte* Morley is, that that part of the assets belonging to the joint estate in the lifetime of the father was distributable among the joint creditors of the firm in which the father was a partner. I am not at liberty, if I had the inclination, which certainly I have not, to go against a plain and distinct authority and recent decision of the Court of Appeal. The point was very fully considered in the judgment of Lord Justice James and Lord Justice Mellish, and nothing I have heard tends to impeach that opinion. *In re* Simpson, L. R. 9 Ch. 572, is a case of a totally different character. There it was provided that, if a partner died, all his interest in the partnership was to vest in the continuing partners, and that that which was his and their joint estate should thenceforth be joint estate of the survivors. That is authorized by other cases to which I will not trouble to refer.

The Court of Bankruptcy is a court of equity, and it has always been so from the earliest bankruptcy statute that was passed down to the latest. The administration of the court has always been equitable. The execution of the act was intrusted to and remained for a great many years in the hands of the head of the Court of Chancery, and all the decisions which can be referred to proceeded upon equitable principles, except those few cases which are to be found at common law, where common-law authorities alone prevailed. Wherever any question of the equities between partners arises, the court refers to the principles which govern the administration of property in the Court of Chancery, and they only are applicable to the administration of bankruptcy. In this case it is not a matter of dispute that all the joint debts existing at the date of the death of the elder Mellor are paid, except that of the bankers, and it is also admitted that there are certain specific assets which were the property of the joint estate at the date of the elder Mellor's death. Supposing the assets are distributable among the joint creditors, if there were more than one, there being but one, they are payable to the bankers, who are the only remaining joint creditors of the old firm of Mellor & Son.

The appeal must be allowed, with costs.

RAND *v.* WRIGHT ET AL.

141 Ind. 226: 39 N. E. 447. 1895.

HOWARD, J. This action was brought by the appellant, as receiver of the Indiana Banking Company, to recover $214,200, with interest from February 28, 1878, out of which sum, it is alleged, the said banking company was on said date defrauded by appellees in the sale by them to said company of certain stock of the First National Bank of Indianapolis, No. 55. The error assigned on this appeal is the sustaining of a demurrer to the complaint. The complaint is of great length, covering about one hundred closely written pages. No question seems to be raised as to the merits of the action itself, the only matter discussed by counsel being whether the suit could be brought in the name of the receiver. We shall therefore set out only such of the facts alleged as seem necessary to consider in order to decide the question before us.

From the year 1865 there had existed in the city of Indianapolis a co-partnership engaged in the banking business under the firm name and style of the Indiana Banking Company. On the 1st day of March, 1875, the members of this firm, to wit, Frederick A. W. Davis, William H. Morrison, John L. Ketcham, Jane M. Ketcham, William Needham, Peter J. Banta, Peter Ditmars, and Samuel Miller, entered into a written agreement of co-partnership under said name and style of the Indiana Banking Company, with a paid-up capital of $300,000. This partnership was to continue until the 1st day of March, 1880, with a proviso in the agreement that the same might be extended after said date, "as may be deemed best for the interest of the then owners of said banking company." The following provisions were also made: "No partner shall sell his shares or interest in this bank to any person whatever without first offering said interest to the other partners. And in the case of the death of any one of the partners, his or her heirs or legal representatives shall occupy the same place in the co-partnership as was occupied by the partner; and it shall not be competent for such heirs or legal representatives to withdraw such capital until the expiration of the term of partnership. The president, cashier, and assistant cashier are the only persons authorized to bind the partners in this banking company; and their official signatures are hereby declared legitimate and binding upon all."

It was during the term of the partnership so formed that the alleged fraud was practised upon said banking company by the appellees, New and Wright, then president and vice-president of said First National Bank of Indianapolis, No. 55; the details of which alleged fraud are set out very fully in the complaint.

It is further alleged that at the close of said partnership period of five years "the said partners, in accordance with said partnership

articles, upon consultation, agreed to and did extend and continue said partnership for the further period of two years, with all its rights, credits, and assets of every description, including said stock and all choses in action, and without any dissolution or withdrawal of capital or assets of any kind or description." The parties who entered into the agreement for extending the term for two years from March 1, 1880, to March 1, 1882, were the same persons who entered into the original articles of co-partnership. The articles of agreement for the extension did not themselves differ essentially from the original articles, or, at least, so far as any question before us is concerned. During the period of extension, on March 18, 1881, one of the partners, William H. Morrison, died intestate. Thereupon his widow, Mary Morrison, qualified as administratrix of his estate, and, in accordance with the agreements of co-partnership, took his place in said firm. Thereafter Mary Morrison and the surviving partners continued the business of the firm unchanged, until a short time before the expiration of the period of extension, when, it is alleged, that, "for the purpose of continuing said business with all its rights, credits, assets, choses in action, duties, and obligations of every nature and description, and to avoid a dissolution and winding up of the affairs of the said company, and to the end that said Samuel Miller might be permitted to retire from said business and the said Mary Morrison become individually interested therein, without any interruption or break in said partnership business, and that the partnership assets of every kind and description should remain and continue in the business under the same name and style," a new agreement of co-partnership, and also one of sale and transfer of the interest of Samuel Miller, were executed.

By these last agreements the name of the partnership continued as before, the Indiana Banking Company. The capital stock remained the same, $300,000; the Miller stock being purchased in proportional parts by the other members. Mary Morrison continued to represent her husband's estate as administratrix and widow, and also became a stockholder in her own right in the redistribution of the whole stock. The board of control was continued as before. The term of the partnership was made to continue three years from March 1, 1882, with provision for extending the term as before. Provision was also made, as before, for purchasing by remaining members the stock of any member who should wish to retire, as was also the provision in relation to the death of a member. In all other respects the provisions of these articles were such as to continue, as near as might be, the original company according to the terms of the first articles of agreement; the sole substantial change being that Samuel Miller's interest passed to the remaining partners, while Mary Morrison took her husband's place. The sum total interests of the company remained identical. In the agreement of purchase of the Miller interest the remaining partners assumed "all debts and liabilities of

the former firm," it being "declared to be the true intent and meaning" of the agreement that the remaining partners "will pay and save said Miller harmless from all debts and liabilities for which he is legally liable as partner." In his agreement of sale to his partners Miller stated that the conveyance was of "all my right, title, claim, and interest in and to all the estate, property, assets, and business of the firm and partnership known as the Indiana Banking Company, . . . this transfer covering all real estate owned by [said company], or by any person or persons in trust for [it], and also all judgments, notes, accounts, bills, credits, choses in action, and property of any and all kinds and description" owned by said firm, or in which it has any interest. The transfer of interest and title from the old company to the new could hardly be more complete. No element of value whatever was left out. The property rights and interests of the Indiana Banking Company were identical in the old and the new company.

It is further alleged: "That thenceforth said last-named partners continued to carry on said banking business without interruption, under the same firm name, and without other change, and with the same assets, rights, and credits, and choses in action, until the 9th day of August, 1883, when, by reason of the depletion of its assets, and the impairment of its credit, resulting from and occasioned by the wrongful and deceitful practice and false and fraudulent statements of the defendants, New and Wright, in connection with the purchase by said bank of said defendants, as hereinbefore set forth, of the stock of said First National Bank, No. 55, it was compelled to and did close its doors and suspended said business; and thereafter, on the 15th day of August, 1883," in an action in the Superior Court of Marion County, brought by the partners by way of settlement of their affairs, "said court then and there having full and complete jurisdiction of the subject matter of said action and the parties thereto, one John Landers was duly appointed receiver of all and singular the assets of said Indiana Banking Company, including all its rights, credits, and choses in action, and the said Landers qualified and entered upon the discharge of his duties as such receiver; and thereafter, to wit, on the 8th day of October, 1883, said John Landers was by said Superior Court removed from his said position as such receiver, and John C. S. Harrison was duly appointed receiver in his place and stead, and duly qualified and entered upon the discharge of his duties. And afterwards, to wit, on the 23d day of February, 1884, said Harrison, as such receiver, was by said Superior Court, in said cause, . . . ordered and directed to institute, in his own name as such receiver, for the use and benefit of the creditors of said Indiana Banking Company, a suit against the said defendants, New and Wright, on account of the frauds practised in the sale of said stock, and, in accordance with said order said Harrison, as such receiver, did, on the 23d day of February, 1884, institute the action

herein." The resignation of Harrison as receiver, and the appointment of the appellant in his stead, and the substitution of appellant as plaintiff in this suit, are finally alleged.

The contention of appellees is: That there are in this case at least three co-partnerships, each known by the name of the Indiana Banking Company, — the first organized for five years, under the articles of 1875; the second organized for two years, under the articles of 1880; and the third organized for three years, under the articles of 1882; that the right of action against appellees, if any, originated in February, 1878, during the existence of and in favor of the first co-partnership. That no assignment of said right of action from the first banking company to the third is shown, nor are any facts alleged from which such assignment, may be inferred. That it is not, therefore, shown that such right of action ever passed to the last banking company, of which appellant is receiver, and, therefore, that he cannot be the proper party to bring this suit.

We think it very clear from the facts set out in the complaint that there were at most but two companies known as the Indiana Banking Company. The first articles provided for a term of five years, with the right of continuance for two years longer, if the partners, at the end of the five years, so elected. These partners, being the same identical partners who entered into the original agreement, did elect to continue the partnership, and they did actually so continue the partnership. The partners were the same, the capital stock the same, the government by a board of control the same. We think it too plain from a reading of the complaint that the right of action which accrued to the company in 1878 passed along with the renewal of the company quite as much as the money in the vaults, or any other property or right of the original co-partnership. To the assertion that such right of action did not pass with the other property, it might well be asked: Whom did it go to? What became of it? It was not a right of person, but a right of property, and could not fail, even if all the partners had died; but, on the contrary, all the original partners were living, and still present in the continued company, with their combined property and property rights and interests unchanged and unimpaired.

By the death of William H. Morrison in March, 1881, however, there can be little doubt, as we think, that the law would have worked a dissolution of the partnership, were it not for the provision to the contrary in the articles of agreement. Schmidt *v.* Archer, 113 Ind. 365, and authorities cited. By that provision Mary Morrison, widow and administratrix of William H. Morrison, took his place in the company, and the partnership was continued under the board of control until March 1, 1882.

Only the capital stock and partnership property of William H. Morrison, already in the company at his death, however, were controlled by this provision, and not the remainder of his estate. The

authorities cited by appellees make this sufficiently apparent. Story, Partn. § 201; Burwell *v.* Mandeville's Ex'rs, 2 How. 560; Stewart *v.* Robinson, 115 N. Y. 328. See also Vincent *v.* Martin, 79 Ala. 540; Stanwood *v.* Owen, 14 Gray, 195.

On the formation of the last partnership, in February, 1882, by the terms of the agreement, as set out in the complaint, we think it very clear that, while a new partnership was entered into, which continued from March 1, 1882, until the insolvency and appointment of the receiver, in August, 1883, yet all the capital stock, property, and assets of every description belonging to the first partnership, including the right of action in this case, were transferred, unchanged and unimpaired, to the new company, in the same fulness of title as they were held by the old company. One of the partners having died, and another having retired after disposing of all his interest to the remaining partners, these surviving partners succeeded to the full right of disposing of the partnership property and closing up its business. Willson *v.* Nicholson, 61 Ind. 241; Anderson *v.* Ackerman, 88 Ind. 481; Valentine *v.* Wysor, 123 Ind. 47; Strange *v.* Graham, 56 Ala. 614; Stillwell *v.* Gray, 17 Ark. 473; Ober *v.* Railway Co., 13 Mo. App. 81; Kinsler *v.* McCants, 4 Rich. Law, 46; T. Pars. Partn. 440; Lindl. Partn. 341; Bates, Partn. § 718, and other sections and notes. The surviving partners in this case deemed it best to join with the representative of the deceased partner in continuing the company, and to that end, with her, entered into new articles of agreement. All the old interests were retained in the new firm. They could go nowhere else, for there was no owner of any interest in the old firm who was not a member of the new firm, retaining his proportionate share in the new firm as he did in the old.

Only creditors, or some of the partners themselves, to protect endangered interests, could disturb the new firm in the full and free exercise of every right enjoyed by the old firm. This the partners did do, as they had a right to do in the action brought by them, in which the receiver was appointed. Even the partners, however, could not complain of this action, and of the appointment of the receiver, which was the result of their own deliberate act. Neither could the creditors complain of it, for its sole object was, by the appointment of a receiver, to collect and dispose of the assets of the firm, and so secure the rights of the creditors themselves. As a matter of fact, there is no one who could rightfully complain, either of the formation of the new company, and the transfer to it of all property and property rights of the old company, or of the appointment of a receiver to take possession of all property, and collect whatever was due the company. And as a matter of fact, also, there is no one attempting to complain of any of these things, except the appellees, against whom the company and the receiver claim the damages involved in this action.

It is idle to say, in this condition of affairs, that the right of

action in question which had accrued to the old firm did not pass fully and unimpaired to the new firm, and from the firm itself to its receiver, when appointed. There was no place else where it could rest. The partners in the new company had assumed the liabilities of those in the old, even as a consolidated railroad company does those of the component companies; and they were, in like manner, also entitled to enjoy all the properties, rights, and interests of the old partners. Railway Co. *v.* Boney, 117 Ind. 501; Railway Co. *v.* Prewitt, 134 Ind. 557. But when the receiver was appointed for the new firm, on petition of one or more of the partners, all the rights of the firm at once passed to him, in trust for them and their creditors, including, of course, authority to bring this suit.

The judgment is reversed, with instructions to the court in General Term to direct the court in Special Term to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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§ 5. Liability of Surviving Partners.

KENNEY et al. *v.* HOWARD et al.

68 Vt. 172: 34 At. 700. 1896.

Ross, C. J. Chester Downer and defendant Howard were partners in a lumbering business. February 14, 1890, Chester Downer deceased. The partnership then owned a large amount of personal property and real estate, and was also indebted to a large amount. The defendant Howard, the surviving partner, being unable to sell the partnership property so as to meet the debts of the firm, raised money on his own notes to pay a portion of such indebtedness. He had sold some of such property, for which he had not been paid. The remaining partnership personal property had been appraised as a part of the estate of Downer. In this state of the affairs of the partnership, the surviving partner, Howard, purchased the interest of the estate in the partnership personal property appraised, and entered into an agreement with the plaintiffs by which he bound himself "to apply the money received for said lumber so sold and not included in said appraisal, to reduce said indebtedness of the said Downer and Howard; and he further agrees, secondly, to apply the purchase price of said lumber, to wit, the sum of $7,510, also, on said indebtedness of said firm, until such indebtedness is fully extinguished; thirdly, to apply the remainder of said purchase money, if any, to settle and adjust any unsettled deal or balance that the said Howard may be owing said Downer estate; and, fourthly, if there is any left of said purchase money, to apply the same on the notes which the said Howard is owing the said Downer estate."

The defendant Howard gave the bond in suit to secure the fulfilment of his portion of the agreement above quoted. The only claimed breach of the bond is that he used some of the purchase price of the lumber, or of the $7,510, to pay the notes which he had given to raise money to pay partnership indebtedness, while managing the business as surviving partner. The contention is, was this an application of the purchase price of the lumber "on said indebtedness of said firm until such indebtedness is fully extinguished"? If not, there was a breach of the bond in suit, although he subsequently paid all the partnership debts, so that none were returned allowed against the estate. If so, then there has been no breach of his bond by defendant Howard.

In determining this contention, it is to be borne in mind that the agreement is between the estate of Downer, the deceased partner, and Howard, the surviving partner. The death of Downer dissolved the partnership. Yet having borrowed the money, and used it for paying partnership debts, Howard would be entitled to pay the notes out of partnership funds. The notes, in form, were his personal debts. The holder of the notes, at law, would be obliged to sue him alone. But the money derived therefrom having been used in the partnership business, the notes, if paid by the estate of Downer, would have been extinguished, and it could have collected only one-half of the sum paid from Howard. Sprague *v.* Ainsworth, 40 Vt. 47.

In that case the plaintiff sought to recover on a promissory note signed by the defendant, which he purchased of Ziba Sprague. Under the charge of the court, the jury found that Ziba Sprague and defendant, at the time the note was given, were partners, and that the defendant, with the knowledge and assent of Ziba Sprague, gave the note to the Bank of Royalton to raise money to use in the partnership business; that Ziba Sprague took up the note when it was due, and afterwards sold it to the plaintiff. It was held that the payment of the note by Ziba Sprague was an extinguishment of the note, and that the plaintiff could not recover upon it. This holding is placed on the ground that although, as between the bank and defendant, the note was the individual note of the defendant, yet having been made for, and the money received used in, the partnership business, with the assent of Ziba Sprague, as between Ziba Sprague and the defendant it was a partnership debt, and that its payment by the other partner was, in law, its extinguishment.

We think, in principle, the notes of the defendant, which he gave in his own name, while acting as surviving partner, to raise money which he used in paying partnership debts, was an obligation which, as between him and the estate of the deceased partner, was to be paid out of the partnership assets. These notes were not, and could not be, given with the assent of Downer. His power to assent being taken away by death, the law cast upon the surviving partner the duty of judiciously managing the partnership property, and of pay-

ing the partnership debts, even to borrowing money, if necessary, to pay pressing partnership debts, without such assent. While the payee of the notes could only sue the defendant thereon, yet if the plaintiffs, as executors of the will of the deceased partner, had paid the same, they would have paid a partnership indebtedness, and could have charged only one-half of the sum paid to the defendant. Hence while, between the defendant and the payee of the notes, they were the individual notes of the defendant, between the estate, represented by the plaintiffs, and defendant Howard, they represented a partnership indebtedness. The agreement secured by the bond in suit was between the plaintiffs, as the representatives of the estate of the deceased partner, and Howard, the surviving partner, and bound Howard, first, to apply the purchase money of the partnership property bought by him on the indebtedness of the firm, until such indebtedness is fully extinguished. The notes paid, between the parties to this agreement, secured by the bond in suit, represented a partnership indebtedness. Hence their payment by Howard out of the purchase price of the partnership property bought by him was a fulfilment, and not a breach, of the condition of the bond in suit.

The judgment of the County Court is affirmed.

RUSLING *v.* BRODHEAD ET AL.

35 At. 841: 55 N. J. Eq. —. 1896.

STEVENS, V. C. It appears by the bill that in June, 1894, Calvin E. Brodhead, Robert P. Brodhead, and Daniel C. Hickey were copartners in business, and that as such they made the following agreement with complainant: "For and in consideration of the sum of one (1) dollar in hand received, the receipt of which is hereby acknowledged, we, Brodhead & Hickey, hereby agree to and do hereby sell and assign to Geo. M. Rusling, his heirs or assigns, a one-fourth interest in any and all of the net profits which may arise from the doing of the work under any contract which we may or shall obtain and accept from the Hudson River Railroad & Terminal Company, or their successors or assigns, for the building of a tunnel through Bergen Hill, near Edgewater, New Jersey, and any other work pertaining or belonging thereto. And the said Geo. M. Rusling hereby agrees to furnish his proportion of the capital necessary for carrying on the said work, up to the sum of four thousand dollars ($4,000) for said proportion, *pro rata* with Brodhead & Hickey, as may be required. Executed this 23d day of June, 1892, in duplicate. Brodhead & Hickey. G. M. Rusling." After this agreement was made, Brodhead & Hickey obtained the contract to which it related,

and had completely performed it on or about July 1, 1894. On July 12, 1894, Hickey, one of the partners, died. He was, at the time of his death, a citizen of and resident in the State of New York. The bill alleges that no personal representative of his estate has been appointed "within the jurisdiction of this court." It also alleges that on September 15, 1894, "Brodhead and Hickey, as co-partners, received . . . full payment for all work done under the contract." The complainant prays, as against the surviving members of the firm, an account of profits, and a decree for payment to him of one-fourth part of them. Both of the surviving partners demur on the ground that the personal representative of Daniel C. Hickey ought to be made parties. As the foreign representatives of Hickey's estate are not liable to be sued in their representative capacity in the courts of this State (Durie *v.* Blauvelt, 49 N. J. Law, 114), the complainant has not called upon them to answer, and has not prayed process against them. The question is whether they are, notwithstanding the complainant's inability to bring them into court, so indispensably necessary to the prosecution of the suit that no decree can be made against the surviving partners alone.

The agreement of June 23, 1892, is somewhat peculiar. It does not create an ordinary partnership between the parties, although it contains some of the elements of a partnership. It is not an agreement between A., B., and C. to share profits and bear losses, but an agreement by the firm of A. & B. on the one hand to give to C. on the other, for a certain consideration, one-fourth of the profits which that firm may make in a specified venture. It does not provide that C. shall become, even temporarily, a partner of this firm, or of any new firm to be created *pro hac vice.* Its language is, in substance, this: We, the firm of Brodhead & Hickey, do sell and assign to Geo. M. Rusling a fourth interest in the net profits which may arise from the doing of any work under any contract which we (the firm of Brodhead & Hickey) shall obtain, etc. There are these things to be noted in the agreement. It was intended (1) that the contract which the parties hoped to secure should be taken by the firm of Brodhead & Hickey alone; (2) that Rusling should not have any right of control over or management of the firm's affairs; and (3) that Rusling should furnish capital, up to $4,000, *pro rata*, not with the individual members of the firm, but with the firm itself. The paper is signed only in the firm name. The agreement is not unlike that which was before the court in Hargrave *v.* Conroy, 19 N. J. Eq. 281, and in Walker *v.* Hirsch, 27 Ch. Div. 460, — cases in which it was held that no true partnership existed between the parties.

Now, if the complainant was not a member of the firm of Brodhead & Hickey, but one merely who, by reason of his agreement, had some claim upon it, even though that claim was of such a character that an account was necessary, there would seem to be no substantial objection to allowing him to proceed against the surviving partners, just

as any other claimant might do. According to a perfectly well-settled rule, on the death of a partner, the surviving members are the proper persons to get in and pay its debts. 2 Lindl. Partn. 591. They alone sue and are sued in a court of law. They alone represent the partnership. They are, presumably, more familiar with its affairs than any one else. If they can protect the interests of the firm in a court of law, why can they not in a court of equity? It is no doubt true that in equity, the representatives of a deceased partner are ordinarily deemed necessary parties; but the question here is whether they are, in cases situated as this is situated, so indispensably necessary that the case must fail if they be not present. I do not think they are. It is well settled that persons out of the jurisdiction need not be made parties, unless their presence is indispensable to the ascertainment of the merits of the case, or unless their interests will be prejudiced by the decree. Story, Eq. Pl. § 81; Daniell, Ch. Prac. (6th ed.) *150. Judge Story thus states the rule in regard to partners: "If one of the partners be resident in a foreign country, so that he cannot be brought before the court, and the fact is so charged in the bill, the court will ordinarily proceed to make a decree against the partners who are within the jurisdiction, with this qualification, however: that it can be done without manifest injustice to the absent partner." Tested by this rule, the personal representatives of Hickey may be dispensed with. Their presence is not necessary to the ascertainment of the merits of the case. They had nothing to do with the making or performance of the contract, and, so far as appears, they were entire strangers to it. The surviving partners are fully capable of protecting the firm interests, and no injustice will be done to the estate of the deceased partner because on a settlement of the affairs of Brodhead & Hickey, either in court or out of it, the representatives of the Hickey estate not having been parties to this suit, and not being bound by the decree, will be at liberty to question any account the surviving partners may present to them, and have it corrected if it should appear to be erroneous, just as they would be able to question any other act of the surviving partners done in the execution of their trust.

On the other hand, the refusal of the court to proceed would amount to a denial of justice. The complainant and one of the defendants reside here, and the work under the contract was performed here. To allow the demurrer would be to declare that, although the surviving partners have in hand the profits of the contract, and are legally accountable for them to the complainant, yet that, because certain other persons, who know nothing about the matter, and who cannot be brought into court, are not present, the complainant is remediless. None of the cases cited by complainant go to this length. They are cases in which it was held either that the presence of those interested, but not made parties, was indispensably necessary to the ascertainment of the merits, or cases — notably that of the leading case

of Shields *v.* Barrow, 17 How. 130 — in which manifest injustice would have been done to absent parties by a decree directly affecting their rights.

The demurrer should be overruled.

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§ 6. Firm Debts and Partners' Joint Debts.

In re VETTERLEIN et al., Bankrupts.

5 Ben. U. S. Dist. Ct. 311. 1871.

Prior to May, 1865, the firm of Vetterlein & Co., in Philadelphia, was composed of Theodore H. Vetterlein and Charles A. Meurer. On May 1, 1865, Bernhard T. Vetterlein and Theodore J. Vetterlein were taken in as partners. In February, 1870, Meurer retired from the firm.

Prior to May 1, 1865, the firm of Th. H. & B. Vetterlein & Co., in New York, had been composed of Theodore H. Vetterlein, Bernhard Vetterlein, and Henry Thiermann. On May 1, 1865, Bernhard Vetterlein and Henry Thiermann retired, and Bernhard T. Vetterlein and Theodore J. Vetterlein were taken in, and the business was conducted under the name of Th. H. Vetterlein & Sons, its only capital being the interest of Theodore H. Vetterlein in the former firm. In 1867 Theodore J. Vetterlein retired from both firms.

On February 7, 1871, Theodore H. Vetterlein and Bernhard T. Vetterlein were adjudged bankrupts. The assignee in bankruptcy realized sums from the separate estate of Theodore H. Vetterlein, against whom no individual debts were proved. He also realized something from the assets of each of the firms. Th. H. Vetterlein & Sons were proved to be creditors of Vetterlein & Co. to the amount of $40,000. Different debts were proved against each of the two firms.

The following questions were raised by the assignee and submitted to the court: —

1. Shall Th. H. Vetterlein & Sons and Vetterlein & Co. be treated as separate and distinct firms in the distribution of the assets?

2. What disposition shall be made of the proceeds of the estate of Theodore H. Vetterlein?

3. How shall the assignee treat the indebtedness of Vetterlein & Co. to Th. H. Vetterlein & Sons, as regards the distribution of the assets?

Blatchford, J. 1. Th. H. Vetterlein & Sons and Vetterlein & Co. ought not to be treated as separate and distinct firms in the distribution of assets belonging to Theodore H. Vetterlein and Bernhard T. Vetterlein, as co-partners.

2. If there are no debts proved against Theodore H. Vetterlein individually, the proceeds of his separate estate must, under section 36, be added to the joint stock and property of the co-partners, for the payment of their joint creditors.

3. The assignee ought to take no notice, in the distribution of the assets, of the indebtedness of Vetterlein & Co. to Th. H. Vetterlein & Sons.

In the foregoing conclusions, I assume that no other person is liable jointly with Theodore H. Vetterlein and Bernhard T. Vetterlein in the debts for which they are jointly liable, and that no other person is joint owner with them of the assets in which they are jointly interested.

SAUNDERS ET AL. v. REILLY.

105 N. Y. 12. 1887.

EARL, J. This action was brought by the plaintiffs against the defendant, late sheriff of the city and county of New York, to recover damages against him for making a false return to an execution issued upon a judgment recovered by the plaintiffs against William T. Tooker and Thomas J. Irwin, who were partners under the firm name of Tooker & Irwin. The action was put at issue by the answer of the defendant, and brought to trial at a circuit court, and the trial judge, after the close of the evidence, directed a judgment for the plaintiffs. The defendant appealed from the judgment entered upon that verdict to the General Term, and from affirmance there to this court.

The material facts are as follows: In January and February, 1879, William T. Tooker and Thomas J. Irwin were partners under the firm name of Tooker & Irwin, carrying on business in the city of New York. At the same time Tooker & Irwin, together with Julius A. Candee and Daniel Webster Arnold, were partners under the firm name of Tooker, Arnold, & Co., also carrying on business in the city of New York. In the latter firm Arnold's share was three-twelfths, Candee's share four-twelfths, and Tooker and Irwin's share, jointly, five-twelfths. On the 16th day of January, 1879, these plaintiffs recovered a judgment against Tooker & Irwin for upwards of $800, and early on the next day they issued and placed in the hands of the sheriff an execution on that judgment. Later on the same day, Jane Irwin issued an execution to the sheriff on a judgment recovered by her for upwards of $7,000 against the firm of Tooker, Arnold, & Co. The sheriff, under these executions, levied on the personal property of Tooker & Irwin, and advertised the same for sale. These plaintiffs, then having a further claim for goods sold to the firm of Tooker & Irwin, which was not then in judgment, gave notice to the sheriff, on January 23d, that, as creditors of the firm of Tooker & Irwin, they claimed the application of

the firm property to the payment of the firm debts, and they forbade any sale of the assets of the firm under the execution issued by Jane Irwin on her judgment against Tooker, Arnold, & Co. On February 7th the sheriff, after selling enough of the firm property to satisfy the executions then in his hands against the firm of Tooker & Irwin, proceeded to sell the balance of the property on the execution in his hands in favor of Jane Irwin. In making that part of the sale he announced that he sold the right, title, and interest of Tooker & Irwin, or either of them, in the property. On the 17th day of February, 1879, the plaintiff recovered judgment against the firm of Tooker & Irwin on their second claim against that firm, which was duly docketed, and execution thereon issued on the same day to the sheriff. At the same time their attorney wrote to the sheriff that they required him, under that execution, to levy on any of the assets of the firm of Tooker & Irwin of which he had only sold the interest of William T. Tooker, individually, and Thomas J. Irwin, individually, under the execution issued by Jane Irwin, and that if he had sold under the execution issued to him by Jane Irwin any of the assets of the firm, notwithstanding the notice which the plaintiffs had given him, then they required him to apply the proceeds of such sale to their execution. That execution he returned unsatisfied; and that is the return which the plaintiffs complain of as false.

The property sold on the execution issued by Jane Irwin, or some of it, was still accessible to the defendant, and ample to satisfy the plaintiffs' last execution, if the defendant had the right and was bound to seize it notwithstanding the prior sale.

The claim of the plaintiffs, which has been sustained by the court below, is that the sale upon the execution issued upon the judgment of Jane Irwin simply operated as a sale of the separate interest of Tooker & Irwin in the firm property, and not as a sale of the *corpus* of the firm property; and thus no greater effect was given to the sale than if it had been made by virtue of two executions upon judgments separately recovered against Tooker and against Irwin.

The decision below was based upon the authority of Menagh *v.* Whitwell, 52 N. Y. 146. But we are of opinion that that case cannot properly be invoked for the decision made below, and that the principle there decided was misapplied by the learned court.

A mere general creditor of a firm, having no execution or attachment, has no lien whatever upon the personal assets of the firm. But when a firm becomes insolvent, and thus it becomes necessary to administer its affairs in insolvency or in a court of equity, then the rule is well settled that firm property must be devoted to firm debts, and individual property to the payment of the individual debts of the members of the firm. If one member of a firm conveys to a person, not a member of the firm, all his interest in the firm property, the purchaser takes no part of the *corpus* of the firm property, but only such interest as remains after the equities between the partners have been adjusted and

the firm debts have been paid and satisfied. So, too, it was decided by the case above cited that if all the members of a firm should severally convey to different persons each his interest in the firm property, the persons so purchasing would not take any of the *corpus* of the firm property, but only the interest of each partner after the firm debts were paid, and the equities between the partners adjusted. It is also settled that it would be a fraud upon firm creditors for a member of a firm to take firm property and apply it upon his individual debts, or for the firm to take firm property and apply it upon the individual debts of any member of the firm. Ranson *v.* Van Deventer, 41 Barb. 307; Wilson *v.* Robertson, 21 N. Y. 587. But one of two partners may transfer all of his interest in the partnership property to his co-partner, and the purchasing partner will be vested with the absolute title to the *corpus* of all the partnership property, as if it had always belonged to him. Stanton *v.* Westover, 101 N. Y. 265. And all the members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash they may transfer firm property to pay a firm debt. And they may transfer firm property to pay a joint debt for which they are jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property. Therefore, while firm property will not pass under successive sales upon executions issued against the individual partners, we can see no reason to doubt that such property will pass under a sale upon a joint execution against all the partners, issued upon a judgment recovered for any joint debt whatever.

Upon the facts of this case it is entirely clear that Tooker & Irwin could have taken their firm property and applied it upon this joint judgment against them; and, inasmuch as they had the power and right to do that, they could have turned it out to the sheriff when he came with the joint execution against them; and as they could have turned it out upon the debt before judgment, or upon the execution after judgment, there can be no reason to doubt that the sheriff could take and sell it upon the execution, free from the claim of their firm creditors. After this sale of the firm property upon a joint judgment against both members of the firm, no equity was left in either member of the firm to have the property thereafter applied in discharge of the firm debts. Having been applied in discharge of the joint debt against both members of the firm, all the equities of both members in the property, as against each other, were wiped out; and it is only through the equity which one member of a firm has in the firm property, or against his co-partners, that firm creditors, on the principle of subrogation, can enforce their claims against the firm property. And so, in effect, it was held in the case of Menagh *v.* Whitwell, and Stanton *v.* Westover, *supra.* In 3 Kent's Commentaries, 65, it is said that "creditors have no lien upon the partnership effects for their debts. Their equity is the equity

of the partners operating to the payment of the partnership debts." In Kirby *v.* Schoonmaker, 3 Barb. Ch. 46, it was said by the chancellor: "The co-partners, however, have certain equitable rights between themselves, arising out of the co-partnership, by which either can compel the other to have all the effects of the firm applied in the first place to the payment of the debts due from them as co-partners. And this, as is said in the books, gives the joint creditors a *quasi* equitable lien upon the property of the firm, to be worked out through the medium of the equity of the co-partners as between themselves, and with their assent, or, at least, with the assent of one of them." . . .

Therefore, after the sale of the joint property upon a joint judgment, although the judgment was not recovered upon a debt against the separate firm of Tooker & Irwin, there were no rights, legal or equitable, left to either member of the firm, in the property, and therefore no equity in the firm property to be worked out under them by any of the firm creditors.

The statute (Code, § 1369) requires the sheriff to satisfy an execution against property "out of the personal property of the judgment debtor," and if sufficient personal property cannot be found, then out of the real property belonging to him. There is no statute or rule of law which requires the sheriff to satisfy a joint execution out of the joint property of the execution debtors, or out of the separate property of each debtor. He may satisfy such an execution out of the joint property, or out of the separate property of any one or more of the debtors. In 1 Lindley on Partnership, 515, it is said that, "although the writ of execution on a joint judgment must be joint in form, it may be levied upon all, or any one or more of the persons named in it," and that "the consequence of this is, that the sheriff may execute a writ issued against several partners jointly, either on their joint property or on the separate property of any one or more of them, or both on their joint or their respective separate property. And so long as there is within the sheriff's bailiwick any property of the partners, or any of them, a return of *nulla bona* is improper." And these rules have now been embodied in § 1935 of the Code.

As between themselves Tooker & Irwin were jointly liable for the debts of Tooker, Arnold, & Co., and neither can complain that their joint property has been taken to satisfy such joint liability.

The fact that the sheriff, when he made the sale of this property on the execution in favor of Jane Irwin, announced that he sold the right, title, and interest of Tooker & Irwin, or either of them, in the property, can make no difference. He sold all he had the right to sell by virtue of his execution, and if he sold all the right, title, and interest of Tooker & Irwin in that property, he sold the whole of it, and gave good title to the purchaser. He, therefore, had no right to seize any of that property again and sell it by virtue of the plaintiffs' execution, and his return was not false.

The general denial contained in the defendant's answer put in issue

the material allegations of the complaint, and was sufficient to authorize the defence asserted by the defendant.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide event.

All concur except RUGER, CH. J., not voting; ANDREWS, J., concurring in result.

Judgment reversed.

RICHARDS v. LE VEILLE.

44 Neb. 38: 62 N. W. 304. 1895.

RAGAN, C. James Richards and Gilbert I. Le Veille constituted a co-partnership under the firm name of Richards & Co., domiciled in Douglas County, Neb., and engaged in the business of contracting and building. On the 12th of June, 1891, in the County Court of said Douglas County, Grommes & Ullrich, a co-partnership domiciled in Chicago, Ill., and dealing in liquors and cigars, recovered a judgment against said James Richards and Gilbert I. Le Veille for the sum of $338.70 on a promissory note theretofore executed by the said James Richards and Gilbert I. Le Veille to the said Grommes & Ullrich. On the 8th of July, 1891, an execution was issued on this judgment, and delivered to a constable, who seized certain of the co-partnership property of Richards & Co. thereunder. On the 9th of July, 1891, said James Richards brought a suit in equity to the District Court of Douglas County against his co-partner, Le Veille. In his petition Richards alleged the existence of the co-partnership between himself and Le Veille, the insolvency of said co-partnership, and that the judgment of Grommes & Ullrich was not for a debt of the co-partnership of Richards & Co., but was based on the individual debt of his co-partner, Le Veille, to Grommes & Ullrich for liquors and cigars purchased by Le Veille from Grommes & Ullrich for the former's benefit. Richards prayed for a dissolution of the co-partnership, and for the appointment of a receiver to take charge of the assets of the firm of Richards & Co. A receiver was accordingly appointed, and said constable, in obedience to an order of the court, turned over the property of the co-partnership of Richards & Co. which he had seized on the execution in favor of Grommes & Ullrich to said receiver. Grommes & Ullrich and the constable, by permission of the court, then filed a petition of intervention in the action of Richards against Le Veille, claiming a lien upon the property levied upon by the constable by virtue of such levy. The District Court found and decreed that the interveners had no lien upon said property seized by the constable, and ordered the receiver to hold and apply the proceeds of the sale of the property in accordance with the further order of the court; and from this decree Grommes & Ullrich, and Dingman, the constable, have appealed.

The only issue of fact presented to the District Court was whether the judgment of Grommes & Ullrich against James Richards and Gilbert I. Le Veille was founded on a debt of the co-partnership of Richards & Co., or the debt of the individual member of such co-partnership; and from the order made by the District Court it must have found on this issue that the judgment was not based upon the debt of the co-partnership, and the evidence justifies this finding. Here, then, we have an insolvent co-partnership, the assets of which have been seized on execution for the satisfaction of the individual debt of the members — or one of them — of the firm, and one of the members of such co-partnership appealing to a court of equity for a decree directing that the firm debts should be paid out of the assets of such co-partnership before such assets should be used to discharge individual debts of the members of such firm. The rule is that, where a co-partnership is insolvent, a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such co-partnership or by a co-partnership creditor, will apply the assets of the co-partnership to the payment of the firm debts to the exclusion of the debts of the individual partners. Till's Case, 3 Neb. 261; Roop *v.* Herron, 15 Neb. 73; Caldwell *v.* Manufacturing Co., 17 Neb. 489; Rothell *v.* Grimes, 22 Neb. 526; Banks *v.* Steele, 27 Neb. 138; Tolerton & Stetson Co. *v.* McLain, 35 Neb. 725.

This rule is based on the legal presumption that the creditors of a co-partnership have given credit to the firm on the faith of the co-partnership assets and business, while the debts of the individual members thereof were contracted on the faith and credit of the individual responsibility and property of the members. And when the affairs of an insolvent co-partnership come to be settled by a court of equity it will apply the assets in accordance with such legal presumptions. Saunders *v.* Reilly, 105 N. Y. 12, relied upon by counsel for appellants, is not opposed to this rule. In that case a sheriff levied an execution issued on a judgment against the individual members of an insolvent co-partnership upon the entire firm assets, and sold them. Subsequently a creditor of such co-partnership obtained a judgment against it, and put an execution in the hands of the sheriff, which he returned unsatisfied. The co-partnership judgment creditor then sued the sheriff for making a false return, and the court held that the sheriff was not liable as the co-partnership assets could be levied upon and sold under an execution against all the members thereof for their individual debts.

In the case at bar, if the firm creditors of Richards & Co., and the members of such firm, had remained inactive, and permitted the constable, Dingman, to sell the co-partnership assets levied upon, such sale would not have been invalid because the co-partnership assets were sold to satisfy the individual debts of the co-partners. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created, it is a person, and as such is recognized by the law. Roop *v.* Herron, 15 Neb. 73. And a co-part-

nership, even though in failing circumstances, has the right to pay a part of its creditors in full, to the exclusion of others, so long as such payments are made with an honest purpose. Dietrich *v.* Hutchinson, 20 Neb. 52. The creditors of a co-partnership, merely because they are creditors, are not given a lien by law upon its assets, whether the firm be solvent or insolvent. If they were, it would be impossible for the co-partnership to transact business, as every person who purchased any part of its property would take the property purchased subject to such liens. Nor are the assets of a co-partnership, even though insolvent, held in trust by the members of the co-partnership for the payment of firm debts. A co-partnership may sell, convey, incumber, and dispose of its property in the same manner that an individual may; and the co-partnership assets may be levied upon and sold for the payment of the debts of the co-partnership, or for the payment of the debts of all the individual members of the co-partnership, in the same manner as can the assets of an individual. It is only when, in a proper proceeding, instituted by a member of the insolvent co-partnership, or by a creditor thereof, that a court of equity interferes, and applies the co-partnership assets first to the payment of the co-partnership debts. And such application is not thus made because the co-partnership assets are trust funds for the payment of co-partnership creditors, nor because creditors of an insolvent co-partnership are by law given a lien thereon to secure the payment of their debts; but such application is based upon the equitable doctrine that that fund, on the faith of the existence of which a credit was given, should be applied in equity to the liquidation of such credit.

The decree appealed from is in harmony with these views, and it is accordingly affirmed.

WHELAN *v.* SHAIN ET AL.

115 Cal. 326: 47 Pac. 57. 1896.

BELCHER, C. On January 5, 1895, the defendant Joseph E. Shain commenced an action against William Binz and L. Martella upon their joint promissory note, signed, "Wm. Binz. L. Martella," and caused to be attached certain personal property belonging to a co-partnership of which they were the only members. On January 16, 1895, judgment was entered in the action that he "have and recover from L. Martella and William Binz, defendants," the sum of $1,410.60, as prayed for. On January 8, 1895, the defendant J. S. Reid commenced an action against the same defendants as co-partners, doing business under the firm name of Binz & Martella, upon certain partnership obligations, and caused to be attached the same property that had been attached by Shain. On January 22, 1895, judgment was entered that he "have and recover from William Binz and Lawrence Martella, co-

partners," the sum of $986.48, as prayed for. Under executions issued on both of the said judgments the plaintiff, Whelan, as sheriff, sold the said attached property for the sum of $1,200, and, after deducting his proper fees and charges, there was left in his hands the sum of $1,059. Shain and Reid each claimed and demanded of the plaintiff that the proceeds of the said sale be applied in satisfaction of his judgment, and the plaintiff, being uncertain as to how the money should be applied, commenced this action, setting forth the facts, and asking that the defendants be required to interplead and set up their respective rights to the money in his possession, and that the matter be determined by the court. And subsequently, with the consent of the parties and under an order of court, plaintiff paid the money into court. The defendants answered the complaint, each setting up his claim and right to the money as against his co-defendant. Upon the issues thus framed the case was tried, it being admitted, during the trial, that the property sold was the partnership property of Binz & Martella. The court found the facts and gave judgment in favor of defendant Reid, from which judgment and an order denying his motion for a new trial defendant Shain appeals.

The law is well settled in this State that partnership property must first be applied to the payment of partnership debts. "The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners." Chase *v.* Steel, 9 Cal. 64. "The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not obtained judgment." Conroy *v.* Woods, 13 Cal. 626; 73 Am. Dec. 605. "It has been repeatedly decided by this court that the creditors of a partnership are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens." Bullock *v.* Hubbard, 23 Cal. 501; 83 Am. Dec. 130. And see also Jones *v.* Parsons, 25 Cal. 100; Robinson *v.* Tevis, 38 Cal. 611; Furniture Co. *v.* Halsey, 54 Cal. 315; and Bank *v.* Mitchell, 58 Cal. 42. In his answer Shain alleged, on his information and belief, in substance, that the note on which he obtained judgment was executed by Binz & Martella, as co-partners, and was a partnership contract and obligation, and that the money received thereon from the payee was invested and used in and about the partnership business, and in furtherance of its objects. The court, however, found against him on this issue, to the effect that the said note was not executed by Binz & Martella as co-partners and was not a partnership obligation, and that the money obtained thereon was not invested or used in or about the said partnership business, or in furtherance of its objects, "but that the obligation to pay said sum was the obligation of William Binz and L. Martella as individuals, and not otherwise." There was evidence tending to support this finding; but, if it were

otherwise, under the law laid down in Bank *v.* Mitchell, *supra,* the result would not be changed. The court below was right, therefore, in adjudging that respondent Reid was entitled to have the said money first applied to the payment of his judgment. The judgment and order appealed from should be affirmed.

SEARLS, C., and HAYNES, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, McFARLAND, J., TEMPLE, J., HENSHAW, J.

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§ 6. FIRM DEBT IS DEBT OF EACH PARTNER.

NEWMAN *v.* BAGLEY AND TRUSTEE.

16 Pick. (Mass.) 570. 1835.

THE trustee admitted that he was indebted to the defendant, but alleged and proved that the defendant had assigned all of his property in trust for the payment of debts owing by partnerships of which defendant was a member.

C. A. Dewey and *Sumner,* for the trustee.

Bishop and *Nash,* for the plaintiff.

WILDE, J. . . . But it is objected that a partner cannot assign his separate property to pay partnership debts, so as to avail against the separate creditors of the assignor. This objection, however, does not appear to be well founded. It is true, that the creditors of an individual partner cannot attach partnership property to the prejudice of partnership creditors; because a partner has no distinct and separate property in the funds of the partnership, until the debts of the partners are paid; but this reason fails in regard to an assignment by a partner of his separate property. That is equally liable to attachment by his own creditors, or the creditors of the firm, and an assignment to pay either is good. *Trustee discharged.*

HORNBLOWER, J., IN CURTIS *v.* HOLLINGSHEAD ET AL.

2 Green (N. J. L.), 402. 1834.

I AM not prepared to sustain the doctrine that each partner is a debtor to the whole amount of a partnership debt, in such a sense that a creditor of the firm may proceed against one partner by attachment, for a partnership debt, if the rest of the partners are in this State. In the case of partnerships, the firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership the ideal person, formed by the union of interests, is the legal

debtor. A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law, and in equity. Its property is first to be appropriated to the payment of its debts. The individual partners are indeed liable and bound to the extent of their separate property for the partnership debts. They may therefore be called debtors, but they are only constructively, or rather consequentially, so; their individual liability is a legal consequence; it flows from the remedy; it is, in some respects, like the case of a husband, who becomes bound for the debts contracted by his wife *dum sola;* they are not his debts, strictly speaking, though he is liable for them, if sued during coverture. The very affidavit filed in this case shows that the firm of W. M. Cade & Co. is the debtor, and not the defendant in his individual capacity. An intelligent and honest plaintiff would hardly venture to make affidavit that Curtis was indebted to him in a certain amount, for goods sold and delivered to him, if they had been sold and delivered to W. M. Cade & Co. It is true if one partner be sued at law for a partnership debt, he cannot prevent a recovery, unless he pleads in abatement; but then that he may successfully plead in abatement, shows it is not his individual debt in such a sense that he may be sued for it alone. If he was the real, actual debtor; if it was a debt contracted by, and due from him to the plaintiff, in the strict, legal sense of the term, he could not defeat the action by such a plea. My opinion is, therefore, that, under the attachment act, the creditor of a firm cannot sue out an attachment against one of the firm (who may have absconded) for a partnership debt, if the other partners reside here. But if all the partners have absconded, then an attachment will lie against them all, as absconding debtors, under the provisions of the first section. Nor can an attachment issue against a non-resident partner, if the other partners reside here; but if all the partners reside abroad, then, under the twenty-seventh section, an attachment may issue against all, or any of them, or, if dead, then against their non-resident representatives.

BANK OF BUFFALO *v.* THOMPSON ET AL.

121 N. Y. 280. 1890.

EARL, J. On the 24th day of April, 1882, John Thompson was indebted to the plaintiff upon his individual promissory notes, and was then carrying on business in his own name, and in that way had dealings with the plaintiff. On that day he executed to it a mortgage upon real estate situated in the city of Buffalo, conditioned as follows:

"Provided always, and these presents are upon this express condition, that if the said John Thompson, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said The Bank of Buffalo or its assigns, the just and full sum of all promissory notes, checks, or bills of

exchange which have been or which shall at any time hereafter be made, drawn, indorsed, or accepted by the said John Thompson and which have been or shall at any time be discounted by the said bank for his benefit, when and as the same shall become due and payable, and shall also pay upon demand any and all overdrafts made by him and all balances of account, and all sums of money which now are or shall at any time be due or owing by him to said bank, upon any account whatever, then this conveyance shall be void; otherwise to remain in full force and virtue. This mortgage being given and intended as a collateral and continuing security for the payment of all such indebtedness to the amount of seventy-five thousand dollars."

Subsequently to the execution and delivery of that mortgage Thompson continued his individual dealings with the plaintiff, and it discounted for his benefit many notes made or indorsed by him. Several years after the mortgage was given, Thompson formed a co-partnership with three other persons, under the firm name of Reynolds, Thompson, & Co., and the firm carried on the business under that name, and the plaintiff discounted for the firm several notes made and indorsed by Thompson in the firm name. The plaintiff claims that these firm notes are secured by the mortgage, and the defendants contend that they are not so secured, and their contention has been sustained by the court below, and mainly, it is said, upon the authority of First National Bank of Batavia *v.* Tarbox, 38 Hun, 57.

We think the court below properly construed the condition of the mortgage. It is clear that at the time of the execution of the mortgage, the parties did not contemplate any firm indebtedness, or any indebtedness of a firm of which Reynolds might be a member. The plaintiff was dealing with him individually, and it was obtaining security for his individual and personal obligations, and a fair construction of the language shows that it was intended to secure such obligations and such only. The language is broad and general, and carefully framed so as to make sure that all such obligations should be covered. In ordinary commercial language the obligation of a firm would not be spoken of as the obligation of any one of its members, and a firm is regarded as an entity distinguished from all the individual members of which it is composed. In Parsons on Partnership, 346, it is said: "A partnership is a legal body by itself. We do not say it is a corporation, because it wants some of the most important elements of incorporation, but we say it is a body by itself, and is so recognized by the law for some purposes, and should be — always in a proper way, and to a proper degree — for all purposes; and among these purposes is a placing of its relation to its creditors on the basis of contracting its own debts, and having its own creditors, and possessing its own property, which it applies to the payment of its debts." It was held in Fitzgerald *v.* Grimmell, 64 Iowa, 261, that a partnership under the statutes of that State was a legal entity, known to and recognized by law. It is probably the most accurate to say that a partnership is not strictly a legal entity, distinguished from the individuals composing it. Lindley on

Partnership, 2d Am. ed. 25; Faulkner *v.* Hyman, 142 Mass. 53. In Lindley on Partnership, page 110, it is said: "Partners are collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i. e., as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of the stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtor to or creditors of the firm." But this, the learned author says, is not the legal notion of a firm, and that the firm is not recognized by lawyers as distinct from the members composing it.

This mortgage must be regarded as a commercial instrument, executed in commercial transactions, and must be construed as ordinary commercial men would understand the language used; and we think that among business men a distinction is made between the firm, as an entity, and the members who compose it, and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was a member, and for whose debts, jointly with the other members of the firm, he could be made responsible.

We are, therefore, of opinion that the judgment below was right and should be affirmed. All concur.

Judgment affirmed.

HALLOWELL *v.* BLACKSTONE NAT. BANK.

154 Mass. 359: 28 N. E. 281. 1891.

HOLMES, J. This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant as collateral security for a loan to Smith. The main question is whether the defendant can hold the stock as security, not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the non-performance of this promise, said bank applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any." It then goes on, and these are the important words, "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or

claim was conditional upon Smith's non-performance of his promise. We think it doubtful at least whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so we are of opinion that Smith did not perform his promise within the meaning of the note. The bank demanded payment of Smith on January 3, 1889, and he made partial payments, but failed to pay the residue, and requested the bank to make the balance a time loan, which the bank refused. This was a non-performance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the bank to give notice before taking further steps, such as selling the security, and this it did. We neither construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the bank. On January 3d, if not before, the bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the bank is entitled to hold the security for the bills which were accepted by Smith's firm and not by him individually. It cannot be denied that the acceptances were "claims against him," and that the words used in his note were broad enough to embrace firm acceptances, unless there is some reason in the contract, the circumstances, or mercantile practice, to give them a narrower meaning. Manufacturing Co. *v.* Allen, 122 Mass. 467; Chuck *v.* Freen, Moody & M. 259. If Smith had had private dealings and a private account with the bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte* McKenna (City Bank Case), 3 De Gex, F. & J. 629. See Lindl. Partn. (5th ed.) 119, and note. But we are called on to construe a printed form used by the bank, and presented by it for those who borrow from it to sign. The question is, what is the reasonable interpretation of such words? When insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff alone. The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm, and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of a majority of the court

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there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

Decree accordingly.

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§ 6. Sole Debt of a Partner for Firm Benefit.

WILLIAMS *v.* GILLIES.

75 N. Y. 197. 1878.

Church, C. J. This appeal is on behalf of the defendant Gillies, and is from a judgment for deficiency, arising on a sale under a foreclosure of a mortgage executed by one Dobbs to the plaintiff's testator to secure the balance of purchase money upon the sale and purchase of several unimproved lots in the city of New York. The mortgage was given to secure a bond executed by said Dobbs for such purchase money. The defendant Gillies was charged by the Special and General Term, on the ground that he was a co-partner with Dobbs in the purchase, and was liable as an obligor of the bond. The complaint alleges partnership generally, but claims that Gillies is personally liable for one-quarter of the deficiency upon the ground that he assumed the payment of that amount in a deed which he received of one-quarter interest in the premises. The judge, however, found against a delivery of the deed, and the only question is whether a liability exists by virtue of a partnership.

The judge finds that Dobbs and Gillies and one Raynor agreed to make the purchase on joint account on speculation, Raynor to have half and Gillies and Dobbs one-quarter each; that Dobbs was to take the title and give back a bond and mortgage, and each was to contribute his proportion of the purchase money from his individual means, and divide the profits *pro rata.*

To sustain this judgment requires the adoption of several propositions, all of which I find it difficult to approve. An existing partnership may purchase real estate with partnership funds and for partnership purposes, and it is immaterial in whose name the title is. It is regarded in equity, as between the partners and creditors, as per-

sonal estate. A trust results from the payment of the consideration with partnership funds in favor of the firm. It is also well settled that a partnership may exist for the purpose of dealing in real estate, and there is considerable authority, and perhaps a preponderating weight of authority, that such agreements may be proved by parol, without violating the statute of frauds. The tendency of the decision in this State is in that direction, although the point had never been definitely settled by this court in a case where the question was necessary to the decision.

I shall assume the validity of the parol agreement in this case, but in doing so it is not intended to affirm the proposition unqualifiedly that every parol agreement between two persons to purchase a specific parcel of real estate, and pay for the same from their individual means, and take the deed in the name of one, although with a view of selling it at a profit, is valid and binding, upon the ground that it constitutes a partnership in any commercial sense, and is therefore not violative of the statute of frauds. In some of the cases where this doctrine is held, there were other circumstances which obviated the objection, and there are respectable authorities against the doctrine. I cite a few of those examined on the question. Chester *v.* Dickerson, 54 N. Y. 1; Briggs *v.* Partridge, 64 Id. 471; Traphagen *v.* Bust, 67 Id. 30; Smith *v.* Burnham, 3 Summer, 435; Patterson *v.* Ware, 10 Ala. 447, 694; Bird *v.* Morrison, 12 Wis. 152; Story on Partnership, §§ 83, 139, and cases cited; Parsons on Partnership, 368; Dale *v.* Hamilton, 5 Hare, 369; Buchan *v.* Sumner, 2 Barb. Ch. 336; Patterson *v.* Brewster, 4 Edw. Ch. 352, 364; Lindl. on Partn. 83, and cases cited.

Conceding a community of interest, and in some sense a partnership, it does not follow that all the incidents and liabilities of a commercial partnership attach. The transaction must be construed with reference to the character of the property and the legal rules applicable to it. The bond in question was executed by Dobbs in his individual name. Neither the name of Gillies appears in the bond, nor is there anything appearing indicating that it was executed on behalf of or for the benefit of any other person. It is a general rule that, in order to bind a firm upon an instrument executed by one of its members, it must be executed in the name of the firm, or, in other words, it must purport to be executed by the firm. Especially is this true in the cases of sealed instruments and promissory notes. See cases before cited. National Bank of Salem *v.* Thomas, 47 N. Y. 15; Parsons on Partn. 255; Parsons on Bills, 130; City of Providence *v.* Miller, 11 R. I. 272; Story on Partn. §§ 102, 135, etc.

This objection was sought to be overcome by the General Term, by the position that the individual name of Dobbs might be regarded as the agreed name of the firm for the purpose of executing the bond. If this was so, we should at once encounter the rule that in a conveyance, or any act required to be by deed, the authority to execute it must be conferred by deed. Warrall *v.* Mann, 1 Seld. 229, 239; 12 Wend. 53,

and note. This court has recently held that oral authority to enter into a contract to purchase lands would not bind the principal upon a contract entered into by the agent in his own name under seal. Briggs *v.* Partridge, 64 N. Y. 357. But with great respect I cannot concur in the view taken that the name of Dobbs can be regarded as the firm name, or that it represented any one but himself upon this bond. There is no such finding, and no evidence to warrant such a finding. True, the finding is that Dobbs executed the bond with the consent and authority of Gillies and Raynor, but this does not necessarily imply that he was to execute it as their act. He was to execute it in his individual name, and all the facts imply that it was to be his individual act, in pursuance of the verbal agreement by which they were to share in the profits. If we look at the evidence, it repels the idea of a joint obligation, and tends to show that Gillies refused to take the deed and give the bond and mortgage, because he was unwilling to be bound. It is competent for co-partners to agree to carry on the business of the firm in the name of an individual member. "The question in all cases is whether the name used, and to which credit is given, is that of the firm, or a name which the firm has adopted and used as a name to designate the partnership." National Bank of Salem *v.* Thomas, 47 N. Y. 15. Per Allen, J.

In Ontario Bank *v.* Hennessy, 48 N. Y. 545, under a co-partnership agreement, where one of the members was to transact all the business of the firm, an agreement that the business was to be done in the name of that member was inferred. I do not complain of the propriety of the inference in that case, but it is left in doubt whether the court assented to it. One of the commissioners agreed to the judgment upon another ground, and a third one agreed to it, but it does not appear upon what ground; one dissented and one did not sit. Here was but a single act, that of taking title and securing the purchase money, and the presumption is that the name used in the bond, mortgage, and deed was identical, and there is not the slightest circumstance tending to establish that the so-called firm intended to execute the bond any more than the mortgage, or take the title as tenants in common. The substance of the transaction was that Dobbs was to take title and give his bond and mortgage in his own name, and representing himself and no one else; and this is not inconsistent with the agreement that Raynor and Gillies were to have an interest in the speculation. The question is, who executed this bond, and upon this point the intention of the parties is material. 2 Kent's Com. 25. If the bond was not executed in the name of the firm, nor with the intention that it should be their act, can the vendor claim any rights against the others? I think not. He transferred the land to Dobbs and received $5,000 in cash, and a mortgage upon the premises, and the individual bond of Dobbs, to secure the balance of the purchase-money. This was the security which he bargained for and received and intended to accept. So far as he gave credit to any one it was to Dobbs. It is probable, if not presumable,

that he knew all the facts. Raynor was his son-in-law and the broker who negotiated the sale. I think the case fairly shows that all the parties, including the vendor, intended the transaction to be precisely what it purports on the face of the papers, and that neither of them intended or supposed that any one was liable upon the bond but Dobbs. Raynor afterward became liable for the proportion of the bond represented by his interest, under the parol agreement, by accepting a deed assuming such liability; but Gillies refused to accept the deed tendered him for his interest and assume that proportion of the bond and mortgage, and judgment was not even asked against them as co-obligors. The liability based upon partnership seems to have been an afterthought. It is only by artificial and unnatural construction and inference, changing the real character of the transaction from what it was, that the liability of Gillies can be established, and I do not think there is any legal warrant for it. Whatever validity there may be in the verbal agreement, it was an agreement *inter sese*, with which the vendor had no concern, and which he cannot avail himself of.

The conclusion of the Vice-Chancellor in Patterson *v.* Brewster, 4 Edw. Ch. 364, where a similar attempt was made, is appropriate here. He said: "The court must therefore intend that he made the contract to sell on the personal responsibility of Wetmore and Havens, and upon the mortgages by way of further security. He must not complain if there is no other or better remedy than the securities which he holds can afford him." The payments upon the bond and mortgage by Gillies may tend to confirm the verbal arrangement that he was to have an interest, but they have no effect in changing the character of the bond from an individual to a joint obligation. They are as consistent with the former as the latter. I am unable to find any principle or precedent which will justify a court in holding Gillies personally liable as a joint obligor of this bond.

The judgment to that extent must therefore be reversed.

All concur, MILLER and EARL, JJ., absent at argument.

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§ 6. FIRM DEBT CONVERTED INTO SEPARATE DEBT.

MOTLEY *v.* WICKOFF.

71 N.W. (Mich.) 520. 1897.

MONTGOMERY, J. This case was determined by the Circuit Court upon an agreed state of facts. The defendant and one Gill, as copartners, became indebted to the plaintiff in the sum of about $140. In April, 1891, Wickoff retired from the firm of Wickoff & Gill, and Gill, in consideration of the partnership property all being turned over to him, assumed the payment of all the partnership debts. After the dis-

solution of the firm, and before this action was brought, the amount had been reduced from $140 to $116, by payments to plaintiff made by Gill. It further appears that Gill, shortly after the dissolution, stated to plaintiff that he had assumed, and agreed with Wickoff to pay, all the partnership indebtedness, and that to said statement plaintiff replied: "All right; pay as fast as you can;" that, some time after the dissolution, defendant saw the plaintiff, and stated to him that, according to the terms of the dissolution between himself and Gill, Gill was to pay the sum due and owing to the plaintiff, and asked plaintiff if he would release him (defendant) from the indebtedness, to which plaintiff replied that he would. Upon this state of facts, the case was submitted to the court, upon a stipulation that the plaintiff was entitled to recover if the court should find that the defendant has not been released from the indebtedness. The court found, as matter of law, that there was no consideration for the promise of the plaintiff to defendant to release him from his liability on the partnership indebtedness, and entered judgment for the amount claimed, with costs. Defendant suggests, rather than urges, that the case is one where the rule adverted to in Webber *v.* Alderman, 102 Mich. 639, — namely, that where the surety is induced by the promise of the creditor to forego or relinquish means of indemnity to which he might otherwise have resorted, by the promise of the creditor to exonerate the surety, this may work an equitable estoppel to deprive the promisor of the power to retract, — is applicable. But there are no facts found in this case which make this rule at all pertinent. There is no finding that the responsibility of Gill has in any way been changed, or that defendant has changed his position in the matter because of any assurances given by plaintiff.

The case must turn upon the question of whether there was a consideration to support the promise to look to Gill alone. The authorities are not agreed upon the question of whether the agreement of one joint debtor or co-partner to pay the debt upon which the two are liable is a sufficient consideration to support a release of his co-debtor. The modern English doctrine appears to be that such an undertaking is a sufficient consideration, on the ground that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and that whether it was actually a benefit in each particular case will not be inquired into, but that the changed relation will be held to be a sufficient consideration. See Thompson *v.* Percival, 5 Barn. & Adol. 925, and Lyth *v.* Ault, 7 Welsb. H. & G. 669. This doctrine has also found support in this country, to the extent stated in Collyer *v.* Moulton, 9 R. I. 90, in which it was said: "If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a release for a valuable consideration; one debt would have been substituted for the other." See also Bantz *v.* Basnett, 12 W. Va. 772; Bowyer *v.* Knapp, 15 W.

Va. 277; Waydell *v.* Luer, 3 Denio, 410. *Contra,* Early *v.* Burt, 68 Iowa, 716; Wild *v.* Dean, 3 Allen, 579.

In the case of Johnson *v.* Emerick, 70 Mich. 215, Mr. Justice Champlin, speaking for the court, said: "Such discharge from liability is based upon the express or implied assent of the creditor, upon a sufficient consideration; and a creditor, knowing of such relation, who goes on and deals with the other partners with reference to the debt, may well be held to have assented to the arrangement, and to have accepted the responsibility and promise of the partner assuming to pay such debt. This consideration need not be a money consideration. It may be the obtaining of an additional security, better terms of payment, negotiable securities which the creditor may use in his business, or any other benefit, or it may be the loss of some right or disadvantage suffered by the surety through the act of the creditor." In the present case it will be noted that the transfer of the firm property by defendant to Gill was not induced by any promise of plaintiff, but had occurred before any promise of release was made; nor does it appear, as before stated, that the defendant lost any rights; nor was any security taken or accepted by the plaintiff; nor does it appear that the time for the payment of the debt was extended.

Plaintiff relies upon Walstrom *v.* Hopkins, 103 Pa. St. 118, and Manufacturing Co. *v.* Jennings, 29 Kan. 657. In the latter case it was claimed that the plaintiff had due notice of the dissolution of the firm, and the assumption of the liabilities by Whitney, and that they accepted him for the payment of the bill of exchange. The court said: "The dissolution of the partnership, the taking of all the partnership property, and the assumption of all partnership liabilities by Whitney, in no manner released defendant. The alleged promise of plaintiff was made after the dissolution, and not as an inducement to or consideration of it. The acceptance has never been paid. . . . No additional security of any kind was furnished. The acceptance was not destroyed, and new paper given. The plaintiff received absolutely no consideration, and, even if it did promise that it would look to Whitney, such promise was entirely without consideration, and in no manner discharged the defendant." In Walstrom *v.* Hopkins it was held that a promise by a creditor of a firm to release a partner who had retired from the firm, and to look to the continuing partner only, for the payment of his debt, unless founded upon a legal consideration, is *nudum pactum,* and cannot be enforced.

The weight of authority favors the contention that the promise of the continuing partner may be a sufficient consideration to support the release of the outgoing partner. But, in the absence of such concurring or binding promise, we think no well-considered case can be found, holding that the mere agreement between the partners will of itself support the agreement of the creditor to release the outgoing partner. Such an agreement does not establish a privity between the continuing partner and the creditor, entitling him to sue such creditor

individually. It is only a private executory contract, intended to regulate the rights, duties, and obligations of the co-partners between themselves, consequent upon a dissolution of the firm. Wild *v.* Dean, 3 Allen, 579. In the present case there was not only no extension of time, no acceptance of the paper of the individual partner, but the stipulation does not show an express agreement made to plaintiff by Gill to pay the debt. The finding is that Gill stated to plaintiff that he had agreed with Wickoff to pay all partnership indebtedness, and that to this the plaintiff replied: "All right; pay as fast as you can." It will be noted that this was not simultaneous with the release of Wickoff, nor did it in terms establish a privity between Gill and plaintiff as to the obligation of Gill to pay the debt individually.

We think the judgment should be affirmed. The other justices concurred.

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§ 7. THE NATURE OF FIRM CONTRACTS.

HUGHES *v.* GROSS ET AL.

166 Mass. 61: 43 N. E. 1031. 1896.

HOLMES, J. This is an action of contract for refusing to employ the plaintiff a second year. The plaintiff had a verdict, and the case is here on exceptions. The original contract was in writing, and was made with two partners, Gross and Strauss, for one year from April 25, 1892, with a conditional right of renewal on the side of the plaintiff for one year more. On November 1, 1892, during the first year of the plaintiff's employment, Strauss died, and the business was carried on by Gross. The first question raised by the exceptions is whether Strauss's death ended the contract. At the end of December the plaintiff received a notice from Gross that she would not be employed beyond the first year, stating causes of dissatisfaction. There was an answer from the plaintiff, and a reply by Gross. Exceptions were taken to the admission of the plaintiff's letter in evidence, and to the exclusion of evidence of other causes of dissatisfaction besides those mentioned in the notice.

On February 1, 1893, the defendant Sommers became a partner in the business with Gross, the new firm taking the assets and assuming the liabilities of the old one. Thereafter the plaintiff was paid out of the funds of the new firm, and, according to the plaintiff's testimony, was referred to Sommers for further discussion of her relations with the firm, and had several interviews with him, in which he wanted to terminate the contract. Another exception is to the refusal to direct a verdict for Sommers.

We are of opinion that it could not be ruled as matter of law, that the contract of service was dissolved by the death of a partner. We

have no occasion to criticise the decisions in some of our States and in England and Scotland, where an opposite result was reached by a majority of the judges with reference to different kinds of business from the present, except to remark that the argument put forward in Scotland and elsewhere, that the only contracting party was the firm, and that the firm had ceased to exist, does not agree with the common law. Tasker *v.* Shepherd, 6 Hurl. & N. 575; Hoey *v.* MacEwan, 5 Ct. Sess. Cas. (3d series) 814, 815; Griggs *v.* Swift, 82 Ga. 392; Greenburg *v.* Early, 30 Abb. N. C. 300, 303. The common law does not know the firm as an entity. Hallowell *v.* Bank, 154 Mass. 359, 363. A contract with a firm is a contract with the members who compose it. A joint contract to employ the plaintiff is not ended necessarily by the death of one of the contractors, Martin *v.* Hunt, 1 Allen, 418, and there is no universal necessity that death should have a greater effect when the joint contractors are partners. Fereira *v.* Sayres, 5 Watts & S. 210. If the death naturally would put an end to the business, as it so frequently does, very possibly it might end the employment. We have no need to consider what would be the result if in fact no further business was done, except to wind up the affairs of the firm, as was the case in Griggs *v.* Swift, *supra.* But this business went on without a break, and both parties seemed to have assumed that the plaintiff's contract was not ended by the death of Strauss.

But the foregoing suggestions are not enough to lay a foundation for the liability of Sommers, even assuming that there was evidence warranting the inference that he was content to be bound unless Gross escaped, and that he made an oral contract on the terms of the written agreement. The declaration is on the written instrument, and the refusal to direct a verdict for Sommers must be taken as made either with reference to the pleadings, in which case Sommers must be shown to be a party to the instrument, or else on the evidence, irrespective of the pleadings, in which case, unless he is to be taken to have signed the writing, the statute of frauds would be a defence under our decisions. Hill *v.* Hooper, 1 Gray, 131; Freeman *v.* Foss, 145 Mass. 361. It appears to us that this difficulty cannot be answered, except by attributing an oversubtle meaning to the firm signature and to the acts of the new partners. We cannot read "Gross and Strauss" as not only meaning all those who then were members of the firm, but also as purporting to name in advance all persons who might become members pending the contract. It follows that a verdict for Sommers should have been directed. But there seems to be no reason why the Superior Court, if it sees fit, should not allow the plaintiff to discontinue as against Sommers, and to take a judgment against the other defendant, Gross. Ridley *v.* Knox, 138 Mass. 83, 86; Fifty Associates *v.* Howland, 5 Cush. 214. . . .

Exceptions sustained.

COMMONWEALTH *v.* JAMES.

98 Ky. 30: 32 S. W. 219. 1895.

HAZELRIGG, J. The only question presented on this appeal is whether, when a license to retail liquors has been issued to a firm composed of two partners, and one of the partners has bought out the other, who thereupon retires from the business, the license still protects the remaining partner in selling at the place and during the time for which it was issued.

Upon what just ground the retirement of one member of the firm should work a forfeiture of the license we are not able to perceive. The remaining partner has parted with no rights or given up no privilege secured to him by name in the license to the firm. It is true, a license is said to be a personal privilege, depending on the fitness of the licensee to properly exercise the grant; but it can hardly be supposed that the issuance of a license to a firm or partnership is made to depend on the personal fitness of any particular member of the firm over that of any other member. Rather should we say that the law requires each member to be personally fit before the license would be granted. And the remaining member is certainly not rendered less fit personally to exercise the privileges of the license because his partner has retired.

Such has been the conclusion of this and the Superior Court with reference to pedlers' licenses, Hill *v.* Thixton, 94 Ky. 96, and such was the conclusion of the Superior Court in this case on a former appeal by the present appellee. 16 Ky. Law Rep. 445.

Judgment affirmed.

BUCHANAN *v.* MECH. L. & S. INSTITUTE ET AL.

84 Md. 430: 35 At. 1099. 1896.

FOWLER, J. The appellant was a creditor of John C. Yessler, who was a member of the firm of J. C. Dayhoff & Co. Yessler held the promissory note of his firm for the sum of $2,000, payable to his own order one year after date. In the early part of March, 1894, Yessler indorsed this note before maturity to the appellant as collateral security for the payment of an indebtedness of $815, $500 of which was evidenced by a note of said Yessler for that amount, and the remainder consisted of an open account of $315 for cash loaned at various times. Subsequent to the indorsement of the firm's note of $2,000 by Yessler to the appellant, the firm became insolvent, and receivers were appointed by the Circuit Court of Washington County to wind up its business. During the progress of the distribution of the firm's assets the auditor of that court filed account designated "No. 1," in which the sum of

$5,911.36 was distributed among the general creditors, among whom the appellant was numbered, the auditor having allowed him $719.83 on account of the $2,000 note as part payment of the indebtedness of $815. To this allowance the general creditors of the firm excepted. Their exceptions were sustained by the court below, and hence this appeal.

The exceptions were based upon a variety of grounds, as appears by the record, but the only ones relied upon here, and which we think necessary to consider, are: First, that, inasmuch as Yessler, the appellant's indorser, was a member of the firm, and would not, therefore, be entitled himself to share the distribution of the partnership assets until the payment in full of all the partnership debts, his indorsee stands in no better position; second, that the transfer of the $2,000 note was fraudulent; and, third, that said note, having been passed to the appellant as collateral security for the payment of a pre-existing debt, was not, therefore, indorsed to him in the ordinary course of business, and that, consequently, he was not a *bona fide* holder for value without notice within the meaning of the settled rules regulating the transfer of commercial paper.

The first exception appears to be founded on the general rule, about which, of course, there can be now no difference of opinion, that a partner cannot share in the partnership assets until all the firm creditors have been paid in full. Whether this rule can properly have any application to this case depends altogether upon the legal effect of the indorsement by Yessler to the appellant. If that indorsement is to have its ordinary legal effect given to it by the well-settled rules applicable to the indorsement of commercial paper, the fact that the firm or its creditors had a good defence against the note in question while in the hands of Yessler would not avail them as against the appellant; but if, on the other hand, such indorsement is to be considered merely as an assignment, or if the note itself can be held as constituting notice to the indorsee of existing equities, then the appellant would stand in the shoes of Yessler, and would not be entitled, as against the creditors of the firm, to share in the distribution of its assets. What, then, is the legal significance of the indorsement? This question is answered by Mr. Bates in his work on Partnership (§ 884), where he says that, while a partner cannot sue, yet the note in his hands is not void; but the difficulty is one attending the remedy, rather than the right, and vanishes on indorsement to a third person for value. The transfer, however, he says, must be *bona fide*, and not colorable only. In support of this view he cites many authorities, some of which relate to transactions like the one before us, where the rights of an indorsee of a member of the firm's paper are directly involved, and some of them involve only generally the rights of a *bona fide* indorsee for value. Thus in the case of Smyth *v.* Strader, 4 How. 404, Stevenson, a member of the firm, drew two notes of the firm to his own order, and indorsed them to Stroson & Campbell of New Orleans, who in turn indorsed them to the plaintiff in that case. Although these notes were fraudulent in fact, because Stevenson indorsed

them to the first indorsee to pay an individual claim, yet it was held by the Supreme Court of the United States (McLean, J., delivering the opinion) that, while Stevenson could not recover because he was a partner, yet his *bona fide* indorsee could. See also, to the same effect, Smith *v.* Lusher, 5 Cow. 688; Nevins *v.* Townsend, 6 Conn. 7; Moore *v.* Denslow, 14 Conn. 237; Davis *v.* Briggs, 39 Me. 305; Thayer *v.* Buffum, 11 Metc. 398; Waterman *v.* Hunt, 2 R. I. 302.

But, independent of authority, we think this must be so for obvious reasons. Nothing is more common in the ordinary course of business than the drawing of paper to the order of and in favor of one of the firm, either for reasons of convenience or because the discounting bank may sometimes, either in order to comply with some rule of its own, or for some other reasons, prefer to have the paper payable to and indorsed by one member of the firm, rather than by the firm itself. And when such paper is indorsed *bona fide* and for value by a partner, we are unable to see why such transfer is not equally as valid as the transfer of any other well-known class of commercial paper would be under the same circumstances. In the case of Smith *v.* Lusher, *supra*, the custom of making firm paper in favor of a partner is referred to as one generally prevailing. It was contended in argument that to give the partner's indorsement its legal effect would put it in the power of a creditor of an individual insolvent partner holding an invalid claim of such partner to secure payment out of the partnership assets *pari passu* with the general creditors of the firm, although such individual partner himself would have no standing for that purpose in court. But in answer to this suggestion it is sufficient to say that it necessarily follows, if the appellant is a *bona fide* holder for value, his title and right to recover are not dependent upon the validity of the title of his indorser. It often happens that an indorsee of commercial negotiable paper stands in a better position than his indorser, and hence the well-settled rule which prevails everywhere, "that commercial paper having the quality of negotiability is privileged, and such of it as belongs to the class of bills and notes may be transferred in such manner as to give the indorsee a better right than the party making the transfer." (The second and third exceptions were then considered, and the conclusion reached, that the appellant was a *bona fide* holder of the note, following Maitland *v.* Bank, 40 Md. 540, and Bank *v.* Hooper, 47 Md. 88.) It therefore follows that he is entitled to share in the distribution of partnership assets equally with the other general creditors to an amount not greater than the debt, with interest, which was secured by the $2,000 note, Daniel, Neg. Inst. § 832a, and authorities there cited; also Williams *v.* Huntington, 68 Md. 605, the note held as collateral being taken as the basis of calculation of the amount of the dividend to be allowed the appellant.

Order reversed, and cause remanded for further proceedings, in accordance with this opinion.

McLAUGHLIN v. MULLOY.

47 Pac. (Utah) 1031. 1897.

THIS is an action brought by the plaintiff, representing the Park City Bank, as receiver, against the defendant, who is the assignee of the firm of Kidder & Bro., for money had and received to the plaintiff's use, as such receiver. On and prior to July 21, 1892, George C. Kidder and Russell W. Kidder were co-partners, engaged in the lumber business at Park City, Utah, under the firm name of Kidder & Bro. This firm continued doing business until June 13, 1893, when it made an assignment to the defendant for the benefit of its creditors. On and prior to July 21, 1892, and thereafter until such assignment, Kidder & Bro. were co-partners with one H. P. Mason, and engaged in the business of manufacturing lumber in the State of California, under the firm name of Mason, Kidder, & Co., and a large amount of their lumber was shipped to the firm of Kidder & Bro. In the new co-partnership, Kidder & Bro. constituted one partner, and Mason was the other, the two partners having equal interests therein. The co-partnership so formed, in the pursuit of its business, became indebted in California and elsewhere; and about July 21, 1892, for the purpose of paying these debts, it negotiated a loan of $8,000, from the Park City Bank, it being understood and agreed that the note to be given for the loan should be signed by the individual members of the firm of Mason, Kidder, & Co., as sureties for the firm. On July 21, 1892, the note was executed for $8,000, and George C. Kidder, without the knowledge of Russell W. Kidder, in good faith, believing it to be for the best interests of the firm of Kidder & Bro., and that he had the legal right so to do, signed the name of Kidder & Bro. thereto, as surety for the firm of Mason, Kidder, & Co., and Mason also executed the note as such surety. Five thousand dollars of the money obtained on this paper was paid on the debts of Mason, Kidder, & Co., by its manager, George C. Kidder; and the remaining three thousand dollars was credited to the account of the firm of Mason, Kidder, & Co. with the Park City Bank, and was drawn out from time to time, on the checks of that firm, in payment of its debts. On January 21, 1893, the note was renewed in precisely the same manner in which it was originally given. At the time of the assignment of Kidder & Bro., there was due on the note $8,043.33, no part of which has been paid. The defendant, as assignee of the firm of Kidder & Bro., has received sufficient assets to pay 20 per centum upon the liabilities, but refuses to pay anything on the plaintiff's claim. Judgment for plaintiff. Defendant appealed.

S. M. McDowall, for appellant.

Brown, Henderson, & King, for respondent.

BARTCH, J. . . . The principal contention of the appellant appears to be that the firm of Kidder & Bro. was not bound by the action of George C. Kidder in signing the firm name on the note as surety, with-

out the knowledge of the other member of the firm, because, as is insisted, such action was not within the scope of the co-partnership. No doubt, one firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm, and division of profits made to the constitutent co-partnership, and not to its members, as individuals, unless the intention of the parties be otherwise. So liabilities may attach to the constituent members of the new firm. Bates, Partn. § 150; *In re* Hamilton, 1 Fed. 800; *In re* Gilbert, 94 Wis. 108; Bullock *v.* Hubbard, 23 Cal. 496. The firm of Kidder & Bro. having become a constituent member of the firm of Mason, Kidder, & Co., which is conceded, it became a part of its business, and it was to its interest, as such co-partnership, to sustain and promote the business of Mason, Kidder, & Co. Therefore anything which the firm of Kidder & Bro. did to that end was within the scope of its business, and could be done in the usual manner of transacting partnership business. As a co-partnership, Kidder & Bro. had embarked in the business of Mason, Kidder, & Co., both firms being in the same line of business. The new firm manufactured and furnished lumber, in which Kidder & Bro., as a firm, were dealing. The purpose was to make profits for Mason, Kidder, & Co., which would enure to the use and benefit of Kidder & Bro. In transacting the business of Mason, Kidder, & Co., debts were legitimately created; and, to pay these obligations, the loan was obtained by the firm through George C. Kidder, from the Park City Bank, with the agreement that Kidder & Bro. and H. P. Mason should sign the note to be given for the loan, as sureties for Mason, Kidder, & Co. Under all these circumstances, we are of the opinion that George C. Kidder had the lawful right, he being a member of the firm of Kidder & Bro., to sign the firm name on the note as surety, and that the firm of Kidder & Bro. was bound by such signature. Turnpike Co. *v.* Gulick, 16 N. J. Law, 161, 169; Gulick *v.* Gulick, 14 N. J. Law, 578.

It is also insisted that, regardless of whether the firm of Kidder & Bro. is liable on the note in question, the respondent has no cause of action against the assignee, until it shall appear that he has funds in his possession, belonging to the insolvent firm, after all its firm debts have been paid. The firm of Kidder & Bro. being bound by the execution of the note, the amount thereof remaining due and unpaid constitutes a valid claim against that firm, and must be regarded and treated by the assignee the same as any other firm debt, in the payment of percentage on the firm's liabilities. The cases on which the appellant relies for a reversal do not appear to be applicable to the facts of this case. We find no reversible error in the record.

The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

§ 8. Injuries to the Firm.

FORSTER et al. v. LAWSON.

3 Bing. 452. 1826.

Case for libel. Plaintiffs were bankers in partnership, and the libel complained of was that they had suspended their payments. General demurrer and joinder.

Taddy, Serjt., in support of the demurrer.

Best, C. J. An objection has been made to the declaration, that the action has been brought by three persons jointly, and that they could not properly join in such an action.

The general rule of law is, as laid down in Smith *v.* Cooker, Cro. Car. 513, that where several persons are charged with being jointly concerned in a murder, each of them must bring his separate action for it, and the reason is, that they have no joint interest to be affected by the slander. When, however, two persons have a joint interest affected by the slander, they may sue jointly, and the case of Cooke *v.* Batchelor, 3 B. & P. 150, is not the first case which has determined this point. . . . It has been said that, notwithstanding the judgment against the defendant in this action, if either of the plaintiffs has sustained any separate damage, he may still maintain a separate action. I cannot see how there can be any separate damage. The business injured is the joint business, and the libel only affects the plaintiffs through their business. If, however, a co-partnership be libelled, and the libel contains something which particularly affect the character of one of that firm, I think a joint action may be maintained against the libeller, who would have less reason to complain of such proceedings than he would have if each partner brought a separate action for the injury done to the firm.

Another objection is that the plaintiffs have not stated the proportion of interest which each respectively had in their joint business. It is not necessary for them to do so: with their several proportions the defendant has nothing to do. Any compensation they may recover will belong to them generally, and it is nothing to the defendant how it may be divided among them.

It has also been urged that the words contained in the paragraph are not actionable. I have no hesitation in deciding that, to say of any bankers that they have suspended payment is actionable. For what can be the meaning of such a statement, except that they are no longer solvent? Saying that a banker has suspended payment is saying that he cannot pay his debts. A temporary inability to pay debts is insolvency. The charge of suspending payment is a charge of insolvency. Such a statement will instantly bring all the creditors of a banking-house upon it, and completely stop their business by preventing any

one from taking their bills. . . . It appears to me that the declaration is unobjectionable, and that the plaintiffs are entitled to judgment.[1]

SINDELARE *v.* WALKER.

137 Ill. 43. 1891.

WILKIN, J. . . . The only question involved in the suit is, could plaintiff maintain this action at law on the allegations of his declaration. In substance, these allegations are, that the plaintiff and said Hubka were partners in the dry goods business in the city of Chicago, owning a stock of goods and certain store fixtures, on which they had previously executed a chattel mortgage to defendant in error; that long before the maturity thereof, and without any authority of law whatever, defendant in error, by collusion with said Hubka, wrongfully foreclosed said mortgage, and took possession of not only the goods and chattels described therein, but also of others, of the value of $5,000, belonging to said firm, which he afterwards pretended to sell to said Hubka; that, by reason of said wrongful seizure and transfer, plaintiff was deprived of said goods and the profits and good will of said business; that said wrongs were committed in pursuance of a confederation and collusion between said defendant in error and said Hubka, to injure and defraud the plaintiff. There is no averment that the copartnership between plaintiff and Hubka has been dissolved, or any settlement whatever had of their partnership affairs. The declaration, therefore, not only fails to show any individual title or ownership in plaintiff to said property, partnership business, or the profits or good will thereof, which he says he lost, but affirmatively discloses a state of facts from which it appears that he had only a community of interest therein with his partner, who consented to said transfer, and all that was done by defendant in error.

A partner's right to partnership property is an ownership of all the assets of the firm, subject to the ownership of every other co-partner, all of the partners holding all of the firm assets subject to the payment of the partnership debts and liabilities. Pars. on Partn. 350. It is clear, therefore, that the individual interest of one partner in the firm property and business can only be ascertained by a settlement of the partnership. Bopp *v.* Fox, 63 Ill. 540; Chandler *v.* Lincoln, 52 Id. 77; Menagh *v.* Whitwell, 52 N. Y. 146. This rule applies to the interest of a partner in the profits or good will of the partnership business as well as to the tangible assets of the firm. Until plaintiff's actual interest in the partnership has been determined, there can be no ascer-

[1] The statement has been abridged, and the concurring opinions of PARK, BURROUGH, and GASELEE, JJ., have been omitted.

tainment of his damages. Buchmaster *v.* Gowen, 81 Ill. 285; Sweet *v.* Morrison, 103 N. Y. 235.

We are clearly of the opinion that, on the facts stated in his declaration, plaintiff has no standing in a court of law. We find nothing in the authorities cited by his counsel in conflict with this conclusion.

Judgment affirmed.

CHAPTER IV.

POWERS OF PARTNERS.

§ 1. Power to sell Firm Property.

LAMBERT'S CASE.

Godbolt, 244. *Supra*, p. 210.

TAPLEY *v.* BUTTERFIELD.

1 Met. 515. *Supra*, p. 211.

MABBETT *v.* WHITE.

12 N. Y. 442. *Supra*, p. 212.

MONROE *v.* HAMILTON et al.

60 Ala. 226. 1877.

Bill for a settlement of partnership accounts between Monroe and Hamilton, and to hold the other defendants accountable for partnership property, which they had received from Hamilton. The partnership was formed for the cultivation of certain lands and the production and sale of a crop of cotton and corn.

The chancellor held that the complainant could not repudiate the payments nor the transfers of cotton made by Hamilton, and that complainant had received more of the cotton than he was entitled to under the partnership agreement. The complainant appealed.

R. Crawford, for appellant.

E. Morgan, and *W. Coleman*, *contra.*

Brickell, C. J. The mortgage is a conveyance to Monroe of Hamilton's interest in and to the joint partnership crop, subject to the condition that it is to become void, if at maturity he should pay the mortgage debts. These are his individual, not partnership debts; and as the crops would be gathered, and ready for market, before the

maturity of the debts, it is stipulated, that when gathered, or in a reasonable time thereafter, Monroe should take possession, and dispose of them, for the mutual benefit of the parties, and should settle the partnership dealings, and divide the net profits into two equal shares,—one of which should belong to him absolutely, and the other he should hold in trust for Hamilton, first paying therefrom the mortgage debt, and the residue paying over to Hamilton. The material question is, how far the mortgage operates a limitation of the authority of Hamilton, as partner, to dispose of the partnership crops, to persons not having actual notice of the limitation; and whether the registration of the mortgage operates as constructive notice of such limitation.

1. An assignment by a partner, of all his interest in the partnership property, to a stranger, operates a dissolution of the partnership, of necessity; "It gives rise to a state of things altogether incompatible with the prosecution of a partnership concern." The other partners may not have confidence in the assignee, and may well say that they have not with him entered into a common adventure, nor consented that he should exercise the authority of a partner; nor may the assignee choose to risk his credit and property in an adventure with them. Marquand *v.* N. Y. Man., Co. 17 Johns. 525; Pars. on Partn. 400. An assignment by one partner to another, of his interest in the partnership property, is not, *ipso facto*, a dissolution of the partnership. Whether it shall so operate depends on its terms, and the intention of the parties, as from these it may be collected. If the withdrawal of the assignor from the partnership is contemplated, — if there is a termination of his authority and duty as partner, and as between him and the assignee, exemption from liability for the future transactions which may be had by the assignee, in the prosecution of the original undertaking, it is as to them a dissolution. Pars. on Partn. 400. But, when the assignment is intended as a mere security for a debt, and is to operate only on the share of the net profits of the assignor, on a settlement of the partnership transaction, at the expiration of the partnership, and he remains bound to all duties as partner, — bound to contribute time, labor, and skill to the prosecution of the common undertaking, — it will not operate a dissolution, not even as between the partners themselves. Taft *v.* Buffum, 14 Pick. 322; Buford *v.* Neely, 2 Dev. Eq. 481.

2. Applying this principle to the mortgage, it did not operate a dissolution of the partnership. Hamilton remained bound to all duties as partner, nor was he relieved from liability for the future transactions, within the scope of the partnership business. Such transactions were a necessity to the business in which the partnership was engaged, and are contemplated by the articles of partnership. At the execution of the mortgage, but a small part, if any, of the partnership crops could have been planted. In the course of cultivation, and of gathering, expenses would be necessarily incurred for

which no other provision is made by the articles of partnership, than that they are to be borne equally by the partners. There is no limitation in the mortgage of the authority of Hamilton to make contracts for such expenses, nor of his authority to pay them when contracted. In this respect, his authority is precisely that which is derived by implication of law from the nature of the partnership business; and there is no indication in the mortgage of an intention to withdraw, or to restrain it. The whole effect of the mortgage is to take away his power as partner to dispose of crops, conferring on Monroe the right to the exclusive possession of them, and the exclusive power to dispose of them when gathered, and to create a lien on Hamilton's share of the net profits derived from a sale of the crops, as a security for the payment of the mortgage debts. The mortgage has a twofold operation,— a limitation of the authority of Hamilton as partner, and a charge on his share of the net profits. The undivided interest of Hamilton in the partnership crop when gathered, or in any other part of the partnership property, would have been subject to levy and sale under execution against him, in favor of an individual creditor; and a purchaser at such sale would have been entitled to his share thereof, as ascertained on a settlement of the partnership accounts. Winston *v.* Ewing, 1 Ala. 129; Moore *v.* Sample, 3 Ala. 319; Andrews *v.* Keith, 34 Ala. 722.

3. The mortgage, conveying an interest subject to execution, must have been registered in compliance with the statute, to protect the mortgagee against the rights of judgment creditors, or of subsequent purchasers from the mortgagor. Code of 1876, § 2162. The registration, when properly made, operates as constructive notice to all the world, of the mortgage — of the conveyance of Hamilton's share of the crops — of the property which would be subjected to execution against him. No lien in favor of execution creditors can subsequently attach, and override and defeat it; and every subsequent purchaser from him of such share would be charged with notice of it. This principle of constructive notice from registration is confined to instruments which the statute authorizes to be registered. It cannot be extended to any and every instrument which parties may think proper to register. There must be a statute authorizing the registration, or mere registration will not operate notice. Mitchell *v.* Mitchell, 3 S. & P. 81; Dufphey *v.* Freenay, 5 S. & P. 215; Baker *v.* Washington, Id. 142; Tatum *v.* Young, 1 Port. 298. Nor will registration operate as constructive notice of any and every provision which may be introduced into an instrument, of which it is required. A conveyance of personal property may include a transfer of choses in action, and, while operating as constructive notice of the transfer of the particular personal property described, it would not operate as a notice of the transfer of the choses in action. McCain *v.* Wood, 4 Ala. 258; Stewart *v.* Kirkland, 19 Ala. 162. The reason is obvious; the law does not authorize the registration of transfers of choses

in action, and, therefore, does not cast on those dealing with him who has the possession, and the apparent legal title, the duty to ascertain whether there has been an assignment of them. We have no statute, except as to limited partnerships, which authorizes the registration of articles of partnership, or of limitations or restraints which, by agreement, may be placed on the power and authority of a partner. While, so far as the mortgage is a conveyance of Hamilton's undivided share of the joint crops, its registration is constructive notice thereof, so far as it is a restraint of limitation of his authority as partner, the registration is not constructive notice.

Limitations or restraints which partners, by agreements between themselves, may impose on the authority or power of the several partners, varying or qualifying that which the law implies from the relation, and the nature and character of the partnership business, have no effect upon third persons, dealing with the partners in good faith, and in ignorance of them, though they may be valid and binding as between themselves. Parsons on Partn. 93; Collyer on Partn. § 386.

The bill seems to have been filed rather in a double aspect,— the one to assert the right of the complainant as mortgagee, to pursue the cotton Hamilton had disposed of, though such disposition was within the scope of his power as partner, if it had not been limited and restrained by the provisions of the mortgage, or rather the necessary implication from these provisions. The averments of notice of the limitation and restraint on his power, to those dealing with him, are referable to the averment of the registration of the mortgage, which it is evident the pleader supposed operated constructive notice thereof. The answers deny all notice, and of it there is no evidence. In this respect, therefore, the bill must fail.

The other aspect is, the right of the complainant to pursue partnership assets his co-partner had misappropriated. In this aspect, the bill fails, for want of proof of such misappropriation, prejudicial to the complainant. Whatever of misappropriation may be shown, was in payment of debts for which the complainant was bound individually. The partnership debts having been fully paid, from it no injury resulted to him.

The decree of the chancellor was certainly as favorable to the appellant as the pleadings or facts would justify, and it must be affirmed.

COLUMBIA NAT. BANK OF LINCOLN *v.* RICE ET AL.

48 Neb. 428: 67 N. W. 165. 1896.

IRVINE, C. The Columbia National Bank brought this suit against H. M. Rice & Co., a co-partnership composed of H. M. Rice and the

State Journal Company, a corporation, to recover on a promissory note for $150, and upon an overdraft of $67.42. The defendants denied the allegations of the petition, and pleaded a counterclaim of $500, as a balance due on account of the sale and delivery by Rice & Co. to the bank of a safe. The reply admitted the counterclaim, but alleged payment.

A jury was waived, and the case tried to the court, which found for the plaintiff on its petition, and for the defendants on their counterclaim, and rendered judgment in favor of the defendants for the excess of the counterclaim over the amount claimed in the petition. There was no dispute on the trial as to the validity of plaintiff's claim. The whole controversy concerns the counterclaim. The evidence discloses that, at the time the Columbia National Bank was organized, Rice, acting for Rice & Co., sold the safe in question to the bank for $1,200. Rice individually subscribed for $500 of stock in the bank. The bank paid Rice & Co. $700 in cash, or its equivalent, and credited the remaining $500 due upon the safe to Rice, in payment of his subscription to stock in the bank. It is by this credit that the bank claims to have discharged the balance due upon the safe.

The plaintiff invokes the rule that a partnership is bound by the acts of one of its partners within the scope of the partnership business. But counsel, in argument, overlook the qualification indicated by the latter part of the rule, which is a feature of all the cases they cite in support of their position. It was not within the scope, or the apparent scope, of the business of the partnership, to dispose of its property for the individual benefit of Rice. (After stating the decisions in Norton *v.* Thacher, 8 Neb. 186; Howell *v.* Machine Co. 12 Neb. 177; Levi *v.* Latham, 15 Neb. 509; and Tolerton *v.* McLain, 35 Neb. 725, the learned judge continued:) The case is so plain on principle that we do not deem it necessary to cite any foreign cases. Those from our own State already cited are sufficient to establish the principle. The evidence in this case was somewhat conflicting, but certainly sufficient to sustain the finding that Rice either disposed of the safe in settlement of his private subscription to stock in the bank, or else that, having sold the safe to the bank, he undertook to have the debt owing therefor applied in satisfaction of his subscription to the stock; that this was done without the consent or knowledge of the other partner; and that the bank was aware that the subscription to the stock was that of Rice individually, and not of the firm. Under these circumstances, it was charged with notice of his want of authority.

There was evidence tending to show that Rice had represented to the bank that he had authority to so use the firm property. But the authority of a partner to act on behalf of the firm is based upon the general principles regulating the authority of agents; and it is a primary principle that the authority of an agent cannot be proved by

the declarations of the agent himself. So that Rice's declarations on this behalf did not bind the firm. The bank dealt with him at its peril. Stoll *v.* Sheldon, 13 Neb. 207; Nostrum *v.* Halliday, 39 Neb. 828; Burke *v.* Frye, 44 Neb. 223; Richardson & Boynton Co. *v.* School Dist. No. 11 of Nuckolls Co., 45 Neb. 777. Nor does the rule that, where one of two innocent parties must suffer, the one who has placed the wrongdoer in position to work the injury must sustain the loss, apply to this case. That rule applies where the act was within the apparent authority of the agent. Bank *v.* Thomas, 46 Neb. 861. Here the act was not within the agent's apparent authority.

It is contended that the evidence shows that the State Journal Company ratified the act of Rice, by making a claim to the stock. But the evidence in that respect tends to show that this was merely by serving a notice upon the bank that the State Journal Company claimed an interest in the stock. This notice was served after Rice had absconded, greatly in debt to the partnership; and its object was merely to keep such property of Rice as could be ascertained within reach. It was served before the State Journal Company had any notice that the stock had been issued in part payment for the safe. A ratification, to be effectual, must be made with knowledge of the facts; and therefore the evidence sustains the finding in favor of the defendants in that respect. . . .

Judgment affirmed.[1]

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§ 2. Power to Incur a Firm Obligation.

BOND *v.* GIBSON et al.

1 Campbell, 185. 1808.

Assumpsit for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of *bits* to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his co-partner, he immediately pawned them to raise money for his own use.

Lord Ellenborough. Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his co-partner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership.

Garrow and *Lawes*, for the plaintiff.

Gazelee, for the defendants.

Verdict for the plaintiff.

[1] A part of the opinion, dealing with questions of evidence, is omitted.

BURGAN *v.* LYELL ET AL.

2 Mich. 102. 1851.

PRATT, J. This is an action of assumpsit for work and labor performed for the defendants in their mining business. It is admitted that the defendants impleaded include all the members of the company; that they all signed the original articles of co-partnership and prosecuted the business of mining under them. These concessions constitute conclusive evidence of a partnership in fact, in which all the defendants, as partners, are engaged in the business of mining.

It further appears, that Andrew Harvie, a member and one of the managers of the company, employed the plaintiff to perform the work in question. But whether his powers, as one of the managers of the company, were general, or special and limited, does not appear: nor is it material to a judicial determination of this cause, as every member, in legal contemplation, without any special powers being conferred upon him by the articles of co-partnership, is not only a principal of the firm, but a general agent, for all the co-partners in the transaction of their legitimate company business; Story on Partn. 1; Har. Ch. Pr. 172; each member being vested with power which enables him to act at once as principal; and all are regarded as being present and sanctioning the engagements and contracts which they may singly enter into within the scope of their partnership matters. Story on Partn. 158, 159. Harvie, then, being one of the partners, was vested with the right of contracting with the plaintiff, and any work performed by him for the company, under the contract, would legally bind all of the partners for the payment of it. Although Harvie, as a single member, was inhibited from making such a contract by some express provision of the articles of co-partnership, still the rights of third persons, to whom such provision was unknown, would not be thereby affected, nor would it tend in the least to bar a third person who had, by the procurement of a single member, without notice, rendered services for the company, in recovering therefor, in a suit against all. 2 Greenl. Ev. § 481; Story on Partn. 193. The plaintiff, by the procurement of Harvie, labored for the company, in their mining operations, nine months at $18 per month. In this labor of the plaintiff all the partners were interested, and in judgment of the law all are presumed to have been cognizant of its performance, and to have derived at least some benefit from it; hence, all are, as they should be by every principle of justice, held equally responsible to the plaintiff for the payment of the services thus rendered. And as it regards their joint liability, it is a matter of no legal moment whether some of the partners were dormant in fact, or whether they subsequently assented to or dissented from the proceedings of those with whom they had intrusted the management of the business. They would, nevertheless, be jointly liable to the plaintiff for his work.

After the services were rendered, the plaintiff, as appears by the

case, made out an account therefor against the company, the balance of which, after deducting some small sums which had been paid and credited, amounted to $147.43, on which John Greenfield, their superintending agent of the hands employed on the mining location, certified to John Winder, a member, and also one of the managers of the company, that the account was correct, and the balance thereof was due to the plaintiff. Winder afterwards, on presentation of the account and certificate to him, paid the plaintiff $40, which was indorsed thereon.

It is a well-settled principle of law, "that the acknowledgment by one partner, during the continuance of the partnership, will amount to a promise binding on the firm." The certificate of the superintending agent, and the recognition of the account by a member and one of the managers of the company, constitute sufficient evidence of such acknowledgment. "And so a part payment of a debt of a firm by one partner, during the continuance of the partnership, will not only extinguish *pro tanto* the partnership debt, but will operate as an admission of the existence of the residue of the debt, binding on all the partners." Story on Partn. 160. These are rules of law about which there has never been any disagreement, neither by legal authors nor courts of last resort; and by them, all the members of this company are equally liable to the plaintiff for the payment of the balance due him on account.

The question, "Whether a member who had sold out his shares in the company stock would be relieved from liability without notice, before the work was done, or from the payment of debts created subsequent to such sale," propounded to the court for decision, is involved in the case, as it is drawn up and submitted; the answer is, that each member of the partnership will continue liable to third persons for any debts or liabilities incurred in the transaction of their legitimate company business, until a dissolution of the co-partnership and notice thereof: Story on Partn. §§ 334–336; and that a dissolution by one of the partners silently withdrawing, or assigning his interest in the company stock to another, cannot legally have the effect to relieve such partner from liability for work done before, or debts contracted after, thus silently withdrawing or assigning.

The opinion, therefore, of this court is, that the plaintiff is entitled to judgment for the balance of his account, and interest from the time of its liquidation.

ROTHWELL *v.* HUMPHREYS ET AL.

1 Esp. 406. 1795.

Assumpsit for money lent. Plea of the general issue.

The defendants were partners, linen-drapers in London; the plaintiff was a fustian manufacturer at Manchester. Howell, one of the defendants, had gone down to Manchester to purchase goods in the

way of his trade, and had, in fact, purchased from the plaintiff to the amount of £500. Being about to return, he borrowed £10 from the plaintiff, to defray his expenses to London; and having drawn a bill on the house in London for the amount of the goods, he included in it the £10 so borrowed, and the bill was drawn for £510.

Before the arrival of the goods in London, Humphreys and Howell, the defendants, became insolvent, and the plaintiff stopped the goods *in transitu;* so that the bill was never presented, and the action was brought to recover the £10 lent only.

These facts were proved by a witness called by the plaintiff.

The defence relied upon was, that the action was brought against both partners for a loan of money, admitted, by the evidence, to have been made to one of them, and which, therefore, could not be supported.

LORD KENYON said that, though the loan of money was to one of the partners, it was lent to him while employed on the partnership business, and on its account; that as such it was competent to him to bind the partnership to the payment of a debt so contracted, and which in fact he had done by including the money lent in the same bill with that for goods sold clearly on the partnership account.

Erskine and *Wigley*, for the plaintiff.

Gibbs and *Espinasse*, for the defendants.

Verdict for the plaintiff.

PEASE *v.* COLE ET AL.

53 Conn. 53. 1885.

LOOMIS, J. The question involved in this case is whether one member of a co-partnership formed for the purpose of conducting a theatre in Hartford could, under the circumstances mentioned in the finding, bind the other member by executing a negotiable promissory note in the name of the firm for money borrowed. The finding, in terms, excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm, rather than of the member executing it, must necessarily rest on an authority to be implied. But here again the facts found so circumscribe the range of inquiry as to exclude all the ordinary sources of such authority. The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest. In many cases the decisive fact is found in the customary course of dealing; but not so here, for it is found that the note in question was the only note ever given in the name of the firm. The co-partnership first commenced business in August, 1883, and on the 24th of the same month the note in suit was given. There was therefore very little time for a course of conduct

or usage of any sort to grow up giving any apparent authority. The finding traces the money borrowed only into the hands of McCarthy, the partner who signed the firm name, and no fact appears showing, directly or presumptively, that the act was necessary for any of the purposes of the partnership. The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act; and here, if we examine the legal principles that are applicable, it will be found, not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States, and the uniform tenor of the authorities in England, will be found to establish a controlling distinction in respect to implied authority between commercial or trading and non-trading partnerships. Story Partn. (6th ed.) § 102*a*; 1 Lindl. Partn. (4th ed. by Ewell) top p. 266, and note 1, and cases there cited; 1 Colly. Partn. 648, 658; Metc. Cont. 121, and cases cited in the notes.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business; and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence in order to subject the firm upon a bill or note executed by the partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his co-partners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it. That the partnership in question belongs to the non-trading class seems so obvious as to need no discussion. The brief in behalf of the defendant Cole cites many cases, and gives a long list of pursuits and professions which those cases establish as of the non-trading class, and although the conduct of a theatre is not there mentioned, yet the analogies manifestly include it. To show the existence of the distinction contended for, and its application, we select from a multitude of authorities the following in addition to those previously referred to.

In Judge *v.* Braswell, 13 Bush, 67, the defendants were partners under an agreement to engage in mining business upon lands then leased, or which might be thereafter acquired. One of the members of the firm purchased, without the others' consent, and took conveyances of, mining land in the name of the firm, and gave the bills of the firm therefor. In an action by the payee of the bills against the firm, a defence was made by the other partners that the purchase was without their consent or ratification, and in the plea they renounced

all claim to the lands purchased. The court held that the firm was not liable on the bills, saying that the power of one partner to bind his co-partners rests alone on the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. In non-commercial partnerships, one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority or that such is the customary usage of the particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by the co-partners with the requisite authority.

In Hedley *v.* Brainbridge, 3 Q. B. 316, the defendants were attorneys in partnership, and one of the partners gave a note in the name of the firm to the plaintiffs for the balance of advancements made to one partner who was acting in behalf of the firm. The advances were to be laid out on mortgage by the firm. Lord Denman, C. J., in giving the opinion, said: "No doubt a debt was due from the firm, but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business. . . . Upon the whole, we think that the implied authority is confined to partners in trade."

In Dickinson *v.* Valpy, 10 Barn. & C. 128, the plaintiff was an indorsee for value of a bill of exchange drawn and accepted in the name of a mining partnership by order of its regular directors. It was held incumbent on the plaintiff to prove that the directors had authority to bind the company, and that it was necessary for the purpose of carrying on the business of the company, or usual for other similar mining companies, to draw or accept bills of exchange. Opinions were given by Lord Tenterden, C. J., and Judges Bayley, Littledale, and Parke, and the same distinction was made as in other cases between trading and non-trading partnerships. See also Greenslade *v.* Dower, 7 Barn. & C. 635.

In Levy *v.* Pyne, tried before Baron Alderson, 1 Car. & M. 453, it was held that "If a bill of exchange or promissory note be drawn, accepted, or indorsed by one of two persons who are partners in a business which is not a trade (e. g., as attorneys), in the name of the firm, . . . the plaintiff must give evidence of the authority of the other partner to draw, accept, or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority." See also Rickards *v.* Bennett, 1 Barn. & C. 223; Garland *v.* Jacomb, L. R. 8 Exch. 218.

In Smith *v.* Sloan, 37 Wis. 285, the court, by Lyon, J., after an able

and exhaustive review of the authorities, adopted the following proposition as fully sustained: "We gather from all the authorities that the distinction between a trading and non-trading partnership, in respect to the power of a partner to bind his co-partner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other, as the learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading partnership cannot bind the co-partner by bill or note, drawn, accepted, or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his co-partner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note, who sues upon it, to prove such authority, necessity, or usage."

In Ulery *v.* Ginrich, 57 Ill. 531, the partnership was for farming purposes, and the note in suit was given by one in the name of the firm for money borrowed. It was held to be a non-trading firm, and the same principles were adopted in the cases previously cited.

In Hunt *v.* Chapin, 6 Lans. 139, it was held, Miller, P. J., giving the opinion, "that the rule which authorizes one member of a co-partnership to bind the firm is only applicable to business of a trading nature, and has no application to partnerships for agricultural purposes, or others of a similar character." See also Kimbro *v.* Bullitt, 22 How. 256; Graves *v.* Kellenberger, 51 Ind. 66; Bank *v.* Snyder, 10 Mo. App. 211.

In Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes and Cheques (2d ed. pp. 68, 69), the following propositions are laid down as well-settled rules: "Art. 77. A partner in a trading firm has *prima facie* authority to bind the firm by drawing, indorsing, or accepting bills in the firm name for partnership purposes; and if the bill get into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not. Art. 78. A partner in a non-trading partnership has *prima facie* no authority to render his co-partners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible."

Many more authorities equally pertinent might be cited, but these will suffice to show that the distinction relied upon is strongly supported both in England and in the United States. While we feel constrained to adopt the distinction between the two cases of partnership so far as the presumption of authority or the want of it is concerned, we do not deem it necessary for the purposes of this case, or even quite reasonable, to carry its application so far as to deny absolutely, as some of the cases do, the right to recover on a note given by a non-trading firm for money borrowed for the firm and appropriated to its use, or on a note given in payment of its debts.

Some authorities ignore the test of liability referred to, but adopt another, which is equivalent in result. Chancellor Kent, in his chapter on Partnerships in the third volume of his Commentaries (7th ed. p. 44), omits the use of the terms "trading" and "non-trading," and makes the distinction between partnerships, in respect to the power of one partner to bind the firm, depend on the single test of the usual scope of the business, in connection with the subject matter of the contract. This rule was adopted in Crosthwait *v.* Ross, 1 Humph. 23, where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which to raise money, because it was not within the scope of the partnership business. Though under a different name, the real distinction here taken is between partners in trade and partners in an occupation. Afterward the same court, in the case of Pooley *v.* Whitmore, 10 Heisk. 629, in a most able and elaborate opinion, held that the liability of a partnership firm of the non-trading class to a *bona fide* holder of negotiable paper without notice, upon a note indorsed in its name by a member for his own benefit, would depend upon the nature of the business, the usage of trade and the course of dealing of the particular firm. It was also held that where the nature of the partnership is such that it may or may not be proper to deal in negotiable instruments (as in that case, which was a publishing company), it was error in the circuit judge to charge, without qualification, that the firm was liable if the holder received the note before maturity, in the due course of trade, and without notice. We think the same principle, under the circumstances of the case at bar, made it error in the court below to hold the firm liable. This court hitherto has had no occasion to give prominence to the distinction under discussion. The nature of the partnership business has however been made a ground for a presumption and a test of liability.

In Walcott *v.* Canfield, 3 Conn. 194, the defendants were partners in running a line of stages from Hartford to Albany and back. One of the partners by an advertisement promised to transport passengers and leave them at Albany in a specified time, upon which agreement the suit was based. The advertisement, being the act of one partner, was held not even admissible in evidence against the firm, without previously establishing the authority of that one to bind the others. Hosmer, C. J., in delivering the opinion, on page 198, said: "A copartnership formed to transport passengers and their baggage in a stage does not authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance within a specified time. Unless he had special authority, he could only obligate himself by a contract not within the scope of the connection, and not his partners, who had never expressly or impliedly assented." The subject matter of the contract was different from the case at bar, but it seems even more closely connected with the scope of the business than the giving of the note in suit.

Many authorities lay down the unqualified proposition as if it was applicable to all partnerships, that if one partner raises money on a negotiable bill or note signed or indorsed in the name of the firm, and which comes into the hands of a *bona fide* purchaser, the partnership is bound, although it was in fact for the individual use of the acting partner. The doctrine is so stated in substance by this court in Insurance Co. *v.* Bennett, 5 Conn. 574. The case shows that the partnership was a commercial one. We do not say however that public convenience does not demand the same rule in the case of non-commercial partnerships, where the holder was not advised of the nature of the partnership and its course of dealing, or of other circumstances to put him on inquiry, and where the circumstances would justify the belief that he was dealing with the partnership. We may well leave this for future consideration, for upon the facts found, we think the plaintiff's right was impaired by reason of what he knew in connection with the circumstances. We do not forget that the court below, in terms, found that the plaintiff purchased the note in good faith, without notice of any defect. This of course means simply that there was no actual bad faith and no actual notice, and as matter of fact, it is final; but at the same time the court found special facts as to the plaintiff's knowledge and action which we must also consider, and if we find constructive notice or constructive fraud, the law must prevail.

The plaintiff, as holder, must stand affected by the nature of the partnership, of which he was fully advised. He purchased the note in the face of the presumption that it was unauthorized. To show the general nature of the facts which courts have held to be constructive notice, we cite a few cases. In Livingston *v.* Roosevelt, 4 Johns. 278, A. and B. formed a co-partnership under the style of A. & Co., in the business of sugar refining, and so advertised in the newspapers. B. afterward, without the knowledge of A., bought a quantity of brandy, for which he gave a note indorsed by him with the name of the firm. The plaintiff, who was an indorsee of the note, took the newspapers in which the firm's business was advertised. Kent, C. J., after commenting on certain facts tending to show that the plaintiff knew that the purchase of the brandy was not a partnership concern, proceeded to lay down these principles: "But if the plaintiff did not in fact know that the purchase was made by C. J. Roosevelt on his own account, and acted under the mistaken impression that it was a partnership purchase, still the firm was not bound by the indorsement, because the facts disclosed amounted to constructive notice or notice in law. . . . When a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be circumstances to destroy that presumption. 'If,' says Lord Eldon, *Ex parte* Bonbonus, 8 Ves. 544, 'under the circumstances the person taking the paper can be considered

as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a co-partnership, the declared and habitual business carried on, the store, the counting-house, the sign, etc., are the usual and regular *indicia* by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. . . . When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals."

In 1 Collyer on Partnership, page 650, it is said that, "A note given by one partner in the partnership name, within the scope of the partnership, is binding upon the firm, but the payee is bound to know whether it is within the scope of his apparent authority, and if it is in excess thereof the firm is not responsible." In Cocke *v.* Bank, 3 Ala. 175, the note in suit was signed in the partnership name of J. F. & W. Cocke, who were partners in keeping a tavern. It was executed by J. F. Cocke, and payable to Lea & Langdon for their accommodation, without the knowledge of the other partner, Woodson Cocke. No actual knowledge of the circumstances was shown on the part of the bank, which sued an indorsee, but it was assumed to have been the duty of the bank to make an inquiry. Goldthwaite, J., in delivering the opinion, said (page 180): "The law presumes that the bank, if it inquired at all into the partnership of the defendants, must have received information that they were not partners in a mercantile trade, but only in the business of tavern-keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers." It was held that Woodson Cocke, the partner who had no knowledge of the transaction, was not liable.

In the case at bar the plaintiff had full and actual knowledge of the nature of the partnership, and the law attributed to him knowledge also that one partner could not bind the other by bill or note without authority, and knowing, as he did, that the note had been written and signed by McCarthy, who was irresponsible, and that if he purchased it, it would be upon the credit of Cole alone, and having also actual knowledge of a course of dealing which avoided McCarthy and pointed to Cole alone as the financial representative of the firm, it seems to us the plaintiff took the note at his peril. It was very strange for the plaintiff to inquire of the one who had used the firm name if it was the note of the firm, and omit entirely, when he had ample and easy opportunity, to inquire of the other partner, on whose sole credit he depended; but the court has found that the failure to inquire of Cole was not owing to a belief that the inquiry would result in finding the note invalid, and this we must accept as true. Ordinarily such a finding

would save the rights of a holder in good faith of negotiable paper, but the great difficulty in the present case is that the note was purchased with constructive notice that it was not within the apparent scope of the partnership business, and *prima facie* was not the note of the firm; and the actual course of business, so far as it was known to the plaintiff, tended to increase rather than allay the suspicion of a want of authority.

But the plaintiff contends that the judgment in his favor cannot be disturbed because the burden of proof was on the defendant. On this general subject of the burden of proof, most of the authorities cited in another connection to show the distinction between the two classes of partnerships, and many others that we might cite, assert most positively that in the case of non-commercial partnerships the burden is on the holder of the note. But we concede that many cases can be found which in terms would seem to place the burden on the defendant. In some of these cases the partnerships were in fact commercial, as in the case of Faler *v.* Jordan, 44 Miss. 283. In Doty *v.* Bates, 11 Johns. 544, Platt, J., giving the opinion, said: "The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealings until the contrary is shown on the part of the defendants."

The case is so brief in the report that we cannot see clearly what was involved in the admission of the partnership which furnished the basis for the presumption. It incidently appears in the description of the firm that its business was tanning, currying, and shoemaking. This doubtless involved the buying of hides, bark, and materials for tanning, and the sale of leather and shoes. The basis of the presumption was doubtless the apparent scope of the business. In Holmes *v.* Porter, 39 Me. 157, the head-note omits an important qualification. The proposition laid down by the court is that, "When the contract is made in the name of the firm, it will *prima facie* bind the firm, unless it is *ultra* the business of the firm." The head-note omits the last clause. The case of Carrier *v.* Cameron, 31 Mich. 373, was relied upon by the plaintiff to show that the burden was on the defendant. In terms it so holds, but a brief analysis will show that it is not inconsistent with our position in this case, and will suggest a mode of reconciling many apparently conflicting cases. There was nothing at all in the case to show the nature of the partnership, and the plaintiff's knowledge of it. Graves, C. J., in giving the opinion, stated the question as follows: "Was the plaintiff below required, in order to make out a *prima facie* case, to show in the outset that Carrier had express authority to make notes generally, or else to show either that the co-partnership was one of the class in respect to which such authority is presumed, or that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified?" The question was answered in the negative, upon the authority of Littell *v.* Fitch, 11 Mich. 525. It is to be noticed that the question was simply as to the burden of proof after the fact of partnership was admitted, and before the na-

ture or class of the partnership appeared. That being the position of the case, the court well remarked that, "It was not needful for the plaintiff, by any positive averment or positive proof, to negative a defence which, in virtue of a general presumption, would be intended not to exist. He could not be required to go into particular proof on such a point until some proof should appear in contravention of the presumption." In this statement of the law we fully concur, but it is not applicable to the facts in the case at bar, because the controlling fact in the proposition is wanting. Proof in contravention of the presumption, which at the outset was in favor of the plaintiff, had appeared, and had resulted in the finding of the opposing facts; and it is significant that all the facts which the above question impliedly concedes to be sufficient to overcome the presumption referred to are distinctly found, namely, that there was no express authority to make notes generally or to give this note; that the partnership was of the non-trading class, in respect to which no authority can be implied; that there was no course of business that could imply authority, and that the giving of this note had never been ratified or approved by Cole. Whatever presumption therefore there might have been in favor of the plaintiff at the outset had been fully overcome, and if there exists any further fact from which an authority might be implied, the plaintiff must show it or lose his case.

It is manifest that in the Michigan case, as indeed in all the cases treating of the burden of proof in suits on notes alleged to have been executed by partnerships, an illegitimate use has been made of the term "burden of proof." Properly it is applied only to a party affirming some fact essential to the support of his case. Thus used, it never shifts from side to side during the trial. Loosely used, as in the cases referred to, it is confounded with the weight of evidence, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome; and in this indiscriminate use of the term "burden of proof" much of the apparent conflict in the cases has its origin. For after all the test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities. In the light of principle, we think it may be demonstrated that the position of the plaintiff is untenable. A partnership has been sued on a note executed in its name. Upon the trial the note is produced by the plaintiff, and the first question is, Was it the note of the firm? The plaintiff takes the affirmative of this issue, because, if no evidence is offered on either side, he must fail. He has then the burden of proof, and it remains on him, and does not pass at all to the defendant. But suppose now it is shown or admitted that the partnership alleged exists, and that one of the firm executed and delivered the note in its name. By virtue of the general presumption that authority was given by the partnership, the plaintiff is entitled to recover, if nothing further appears, because the weight of evidence is on his side. But suppose the defendants take their turn, and prove the identical facts here found, —

that there was no authority, general or special, given; no ratification of the act; no course of dealing to imply authority; and furthermore that the partnership was of a class from which no authority can be implied. Is the plaintiff now entitled to a verdict? Has he proved that the note was the note of the firm? Surely not. What then is left on which to rest his case? The preponderance of evidence is not with him. The burden upon him to show that it was a partnership note has not now been met. But it is said that there is a realm of inquiry not touched by either party; that is, that it was not shown whether or not the partnership had the benefit of the consideration of the note. If such a fact appeared, we concede, for the purposes of this case, that it would tend to show that the note was the note of the firm. But if any authority could not be implied as the case stood before, can it now be implied? The case stands precisely as before. There can be no change in the weight of the evidence, because nothing has been added; and the claim of the plaintiff would seem to be reduced to the absurdity that he is to have the same benefit from an unproved fact as from one proved.

There was error in the judgment complained of, and as against the defendant Cole it is reversed, and a new trial ordered.

The other judges concurred, except GRANGER, J., who dissented.

PHILLIPS *v.* STANZELL ET AL.

28 S. W. (Tex. Civil App.) 900. 1895.

HENRY PHILLIPS brought this suit, September 22, 1892, against Stanzell & Levinski, a firm composed of C. J. Stanzell and L. Levinski, and one Ed. Hatton, for money had and received of plaintiff by Stanzell & Levinski, to wit:

December 28, 1891	$300 00
January 14, 1892	50 00
January 25, 1892	10 00
February 1, 1892	180 00
February 6, 1892	20 00
	$560 00

— all of said sums alleged to be due upon demand. Also upon a note of Stanzell & Levinski, of date February 2, 1892, for $350, due at 60 days, bearing 10 per cent per annum interest after maturity, and providing for 10 per cent on amount as attorney's fees in case it should be placed in the hands of an attorney for collection. Also upon another note of Stanzell & Levinski, of date February 6, 1892, for $175, due at 30 days, bearing 12 per cent interest per annum from maturity, and providing for 10 per cent on amount as attorney's fees in case suit should be brought thereon. All of the indebtedness alleged to amount

to $1,085. Principal defence, that the demands sued on were made and incurred by Louis Levinski for his own individual use, and without the authority of the firm; and that the firm never got the benefit of the money loaned for which the debt was incurred, — of which facts plaintiff had notice. Trial by the court without a jury, May 23, 1893, and judgment rendered for all the defendants, from which this appeal is taken.

Jones, Kendall, & Sleeper, for appellant.

Herring & Kelley, for appellees.

COLLARD, J. The assignments of error by appellant question the correctness of the court's decision, upon the ground that the evidence shows the amounts sued for were obligations of the firm, for loans to the firm upon application of one of its members, who had power to borrow the money for the firm, and that the amounts borrowed were used by the firm, and that, if the money loaned was for any other purpose outside the firm business, plaintiff had no notice of the fact, and would not be affected thereby.

Appellees contend that the firm of Stanzell & Levinski, formed for the purpose of carrying on a retail liquor saloon, was not a trading firm, and that one member thereof had not implied power to borrow money and contract the liabilities sued on, it not appearing that the other member of the firm authorized or consented to the same.

We think the co-partnership to carry on a retail liquor saloon was a trading partnership, or trading firm, and each member thereof had the implied power to borrow money and execute commercial paper, and indorse the same in the name of the firm. The definition of a "trading firm" found in 1 Bates, Partn. § 327, has been approved by the Supreme Court of this State in the case of Randall *v.* Meredeth, 76 Tex. 683. It is: "If the partnership contemplates the periodical or continuous or frequent purchasing not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise it is not."

Trading firms have the power to borrow money, and it is one of the incidents of the business, and allied to this is the power to make, draw, accept, and indorse mercantile paper in the usual routine of business, and one member of such firm can ordinarily so bind the firm. Each member of the firm is in law deemed the agent of the firm to issue negotiable commercial paper. 1 Bates, Partn. §§ 341, 370; Schneider *v.* Sansom, 62 Tex. 201. Such transactions are in the usual course of business. This power extends to the running of other enterprises in which the firm has taken an interest. 1 Bates, Partn. § 382. But it is well settled that a member of a trading firm cannot execute a note or bill to pay his separate debt, and a note to pay a private debt, including a debt of the firm, is not binding except as to the firm debt. Id. § 347. If one partner in a trading firm borrow money for the firm on a note made by him for the firm, or lead the lender to believe the loan is for the firm, the firm is liable, though he may subsequently apply the avails to his own use. Id. § 348. If a partner borrow money or

execute negotiable commercial paper for purposes outside of the business, or for fictitious purposes, in fraud of the firm, and the lender or payee has notice of the facts, the firm is not liable to him, but it would be liable to an innocent holder. Id. §§ 342, 348.

Prima facie the note or acceptance of one partner in the firm name in a trading firm binds the partnership, and the burden of proof that it was a fraud, or for a fictitious debt, or for purposes beyond the scope of the business, is on the firm. Crozier *v.* Kirker, 4 Tex. 259; Powell *v.* Messer, 18 Tex. 407; Randall *v.* Meredeth, 76 Tex. 683. In non-trading firms the rule is different. The doctrine of innocent purchasers does not apply. 1 Bates, Partn. p. 355, §§ 343, 345.

Testing the rights of the parties in the case at bar by the foregoing principles, it must be held that the firm of Stanzell & Levinski were bound to pay the sums borrowed by L. Levinski in so far as he undertook to bind the firm, if he obtained the same in the name of the firm, unless the same was obtained by him for his own private purposes, for purposes outside the scope of the business, or to pay fictitious debts; in which case, to exempt the firm from liability, it must appear that J. Levinski or plaintiff had notice of the facts constituting the firm's exemption from liability. The defence set up by the firm and by Stanzell was that the debts and the notes were made without the authority of the firm and on the private account of L. Levinski. We have seen that the law vests in one of the firm the power to create the debts ostensibly for the firm, and no express authority was required to bind the co-partnership, unless notice was brought home to plaintiff or his agent that the authority so given by law to one of the firm was abused, and that the transactions were on account of L. Levinski alone and not for the firm.

The testimony conclusively shows that a part of the debt sued on was for the use of the firm, viz., the note for $350, deposited in bank as a basis of credit for the firm, upon which defendant drew in the course of the business. For this amount the firm is certainly bound, and for all other amounts and debts shown to have been obtained and incurred in the name of the firm for the ostensible purpose of paying its debts or for its use, unless it be shown that the debts were for the separate use of L. Levinski, for fictitious debts due by the firm, or other purposes outside the scope of the business, known to plaintiff or his agent.

The draft for $300 was made in favor of L. Levinski in person, and the firm would not be bound for that, even upon the representation of L. Levinski to plaintiff's agent at the time of the loan that it was to pay debts of the firm or for firm uses, unless it be shown that the amount so obtained actually went into the firm business as a credit or to pay its debts, and the burden of proof is upon the plaintiff to show such fact. But as to all other claims made in the name of the firm, and for its use, the burden of proof is upon the defendant to establish the facts constituting the exemption from liability. If L. Levinski obtained money or credits from plaintiff's agent, inducing him to believe that

they were for the firm's use or to pay its debts, it would be liable for the money or credit so obtained, though L. Levinski may have afterwards misapplied the funds. Notice to plaintiff's agent may be shown by circumstances, and notice or not is a question for the jury, or the court trying the facts. All the money sued for that was obtained by L. Levinski upon the credit of the firm, that went into the business, would be a firm liability, and so would all other money obtained from plaintiff's agent — the latter acting in good faith — on the credit of the firm and loaned to the firm. If plaintiff's agent did not act in good faith, and gave the firm credit for money which he ought, as a man of ordinary prudence, to have known was for purposes not connected with the firm business, he must himself sustain the loss, and neither he nor his principal can look to the firm or Stanzell for the same. Because of the error in the judgment pointed out, — failing to allow plaintiff the amount due on the note for $350, clearly shown to be due, — and because it seems the case was tried upon incorrect principles, that may have improperly defeated a recovery by plaintiff for all the amount sued on except the check for $300 payable to L. Levinski in person, the judgment of the lower court is reversed, and the cause remanded for another trial. *Reversed and remanded.*

BUETTNER *v.* STEINBRECHER ET AL.

91 Ia. 588: 60 N. W. 177. 1895.

THIS is an action at law upon a promissory note purporting to be signed by the firm of Steinbrecher & Hertzler, against the firm, John Steinbrecher and A. Hertzler, the individual members thereof. In defence, the firm and A. Hertzler claimed that the note was executed without their knowledge or consent; that the firm name was signed without authority; and that the co-partnership received no part of the consideration of the note, and was in no way benefited thereby. They further averred that the note was executed by one John Steinbrecher, for his individual use and benefit, which plaintiff well knew, or had good reason to know, at the time he took the note. Defendant Steinbrecher, in his answer, averred that no consideration passed to the firm for the note, and that the giving of the note did not in any way pertain to the business of the firm, which the plaintiff knew at the time he took it. Upon the issues thus joined there was a trial to the court, a jury being waived, and the court rendered judgment against all the defendants for the full amount of the note in suit. Defendants Steinbrecher & Hertzler and A. Hertzler appeal.

J. T. Illick, for appellants.

La Monte Cowles and *C. L. Poor*, for appellee.

DEEMER, J. 1. The appellants contend that the court erred in rendering judgment against them, for that the evidence shows that the note in suit was given, not for firm purposes, but to compass some private ends of the defendant Steinbrecher; that Steinbrecher had no authority to execute the note in the name of the firm, because the transaction was not within the scope of the partnership business. At the time of the execution of the note in suit the defendant firm was engaged in the boot and shoe business in Burlington, Iowa, and, the note being executed in the name of the firm, was presumptively with authority, and within the scope of the partnership business; and the burden was upon the defendants to show that it was without authority, and outside of the business of the partnership. Sherwood *v.* Snow, 46 Iowa, 481; Doty *v.* Bates, 11 Johns. 544; Carrier *v.* Cameron, 31 Mich. 373; Whitaker *v.* Brown, 16 Wend. 505; McMullan *v.* McKenzie, 2 G. Greene, 368. A note or bill given or accepted by one partner in the name of the firm will be binding upon the firm, although the partner may have used his power for his own benefit, provided the lender or holder of the paper was not aware of the fraud. See Sherwood *v.* Snow, *supra;* Bates, Partn. §§ 348, 370, and cases cited; Towle *v.* Dunham (Mich.), 47 N. W. 683. See also Platt *v.* Koehler, 91 Iowa, 592, 60 N. W. 178. There was ample evidence to justify the finding by the trial court that the note was given for partnership purposes. From the testimony it appears that plaintiff was the owner of a "museum," which he desired to sell, and that he employed Steinbrecher to dispose of the same, agreeing to give him 10 per cent of the amount realized for his commission. Steinbrecher sold the museum, and received in payment six notes of $600 each, payable in three months, a year and three months, two years and three months, and so on. The sale was made in October, 1889, and the first note was paid in January, 1890. Out of this note Steinbrecher received his commission. About this time the firm of which he was a member was in need of money, and he tried to borrow from plaintiff, to meet some firm bills which were then coming due. Buettner had no money, but agreed to let Steinbrecher have two of the "museum notes," whereupon the notes were indorsed in blank, and delivered to Steinbrecher, and Steinbrecher executed the note of the firm to plaintiff for $1,200. Shortly afterwards Steinbrecher came to plaintiff, and stated there was a large leather bill due, and that he needed more money. On this representation he secured another of the museum notes, destroyed the firm note of $1,200, and executed a new one in the name of the partnership for $1,800. Afterwards he obtained another, and then another, until he had all of the museum notes, and Buettner held the note of the firm for $3,000. Payments on and renewals of this $3,000 were made until finally the note in suit remained. Of the five museum notes, one was deposited in the First National Bank of Burlington as collateral to two notes of the partnership, and the money was collected and paid on the notes of

the firm. Three of them were deposited with the Merchants' National Bank, placed to the credit of defendant firm, and checked out by them, and the remaining note was sold by Steinbrecher to one E. T. Dankwardt. Steinbrecher stated, when he received each of these notes, that he wanted them to pay firm bills with. We do not overlook the fact that Steinbrecher testified that the first note he made was in his individual name, and that he afterwards, in making renewals, signed the name of the firm because of some threat of the plaintiff, and that the money received on these notes was to pay individual bills; but we think the preponderance of the testimony is against his claim. In any event, the trial court was justified in finding that he received the notes for the firm, and used the most, if not all, of the proceeds in paying firm debts; and, the judgment of the court standing as the verdict of a jury, we must find against the defendants' contention. Steinbrecher himself testifies that a great part of the proceeds of the notes was used in the firm business.

2. It is urged that the borrowing of the notes was not within the scope of the partnership business. We think it is. In Bates, Partn. § 372, it is said: "A partner's right to raise money for the firm extends to indorsing notes as well as making them, or to borrow indorsements, or to borrow a note or signature in accommodation, or to exchange notes or acceptances, or borrow securities." See also Gano *v*. Samuel, 14 Ohio, 592; 17 Am. & Eng. Enc. Law, 1017. Should it be conceded, however, that there was no such authority, the court might well have found that the defendant Hertzler ratified the making of the notes. Steinbrecher says that he secured the "museum notes," and used them as collateral security for the note of the firm, of which Hertzler knew; that Hertzler allowed him to do so, because he was sure the notes would be paid when due, and he was running no risk. It is also shown that the proceeds of the notes, or at least a large portion of them, were used for partnership purposes. "Receiving the proceeds of a bill or delay in disaffirming it will amount to a ratification." Rand. Com. Paper, § 399; Clark *v*. Hyman, 55 Iowa, 14; 7 N. W. 386. We think the court was justified in finding there was a ratification by Hertzler of the acts of Steinbrecher in making the notes in the name of the firm. . . .

We discover no prejudicial error, and the judgment is therefore affirmed.

VETSCH *v*. NEISS ET AL.

69 N. W. (Minn.) 315. 1896.

COLLINS, J. Action upon a promissory note alleged to have been made by defendants, as co-partners. The plaintiff was an indorsee after maturity. The answering defendant admitted the existence of

a partnership for a specified purpose between the defendants, and then alleged that the note was executed and delivered by his co-partner, without his knowledge or consent, and that the sole and only consideration therefor was a private debt due from such partner to the payee named in the note. These were the issues upon which the parties went to trial; and, at the conclusion of the evidence, the court, upon plaintiff's motion, instructed the jury to return a verdict in his favor. Such a verdict was returned, and the appeal is from an order denying a motion for a new trial.

Several assignments of error are urged by counsel, mostly relating to the rulings of the court when receiving testimony; but we pass all of them, and come directly to that which challenges the action of the court when directing a verdict in plaintiff's favor. The evidence showed conclusively that the co-partnership carried on the business of boring wells, buying materials for pumps and windmills, putting these materials together, and placing these articles into wells bored by the firm, or already bored or dug by other persons. Strictly speaking, it was not a trading partnership, although it will be seen upon an examination of the decisions that the line of demarcation between what are trading and what are non-trading partnerships is very indefinite and indistinct.

In 1 Bates, Partn. § 327, the author states that trading partnerships are frequently called commercial or mercantile partnerships, but that these terms seem to be somewhat too narrow, for oftentimes mechanical and manufacturing partnerships are included among trading partnerships, the test being founded, not on the nature of the articles they deal in, but the character of their dealings. Mr. Bates points out the difficulty in the application of any test for the purpose of determining with absolute certainty, as a question of law, what are and what are not trading partnerships, and finally concludes that if the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise, it is not. This, as a general statement, is undoubtedly correct, but the difficulty lies in its application, as will be seen by an examination of the cases cited in the volume referred to (§§ 328 and 329, the last treating particularly of non-trading firms), all of the cases cited being partnerships in occupation; and in some of these cases the difference between trading and non-trading partnerships seems to be ignored, the single test of scope of business being adopted. While, on the authorities, it may not be very difficult, in many cases, to hold, as a matter of law, that the scope of the business carried on by a certain firm renders it a trading partnership, with a power or authority resting in each partner to borrow money for the use of the firm, and to execute and deliver negotiable paper therefor, or to hold, as a matter of law, that the firm business con-

stitutes it nothing but a non-trading partnership, in which the partners have, *prima facie*, no authority to borrow money, or to bind the concern by a promissory note, there are many partnerships concerning which no rule of law as to the implied powers of the partners with respect to firm notes can be applied with safety. In these cases the authority of either partner in this respect must be determined as a question of fact, depending upon circumstances peculiar to each.

Certain it is, from the nature of the business conducted by defendant firm, that the court below could not hold, as a matter of law, that it was a trading partnership, and hence that each partner had implied authority to borrow money for its use, and to execute and deliver a firm note for the same.

The evidence conclusively showed that the note in suit was given for money borrowed to pay a firm debt, incurred for labor performed for the firm, and in its legitimate business, and that the money so obtained was used by the partner who made the note in payment of this indebtedness. But, when the partnership is strictly non-trading, it can make no difference that the money was actually used for its benefit. 1 Bates, Partn. § 343, and citations. The question is one of authority to execute the note, not as to what became of the proceeds, or for whose benefit they were used. But in cases where the court cannot say, as a matter of law, that the firm is either a trading or a non-trading partnership, and that each member has or has not the power to bind the firm by the issuance of negotiable paper, the test seems to be whether the issuing of such paper is essential to carry into effect the ordinary purpose for which the partnership was formed. Id. And, of course, the fact that the firm derived the benefit of the act may be taken into consideration when applying this test.

The liability of one partner upon promissory notes and other contracts made by a co-partner, without his actual knowledge or assent, is a question of agency; and the law applicable to the case now before us is concisely stated in Irwin *v.* Williar, 110 U. S. 499, thus: "If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business, according to the usual and ordinary course in which it is carried on by those engaged in it, in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself, as personally carried on, with the knowledge, actual or presumed, of the partner sought to be charged." And the learned justice who wrote the opinion proceeds to say: "What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact, to be decided by the jury,

from a consideration of all the circumstances which, singly or in combination, affect its character, or determine its peculiarities; and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all of its members." See also Dowling *v.* Bank, 145 U. S. 512.

The court erred in holding, as a matter of law, that, upon any view of the facts, the jury could not find for the defendant who answered. We have not alluded to the testimony introduced by plaintiff which tended to show that the defendant just referred to knew that his partner was to borrow the money from the payee of the note, and to make the note in suit, for such knowledge was denied. It is hardly necessary to say that if the jury found that he was advised that the money was to be borrowed, and the note given, and assented to it, either actually or by implication, a verdict in plaintiff's favor could be sustained on this fact alone.

Order reversed, and new trial granted.

CONGDON *v.* OLDS ET AL.

18 Mont. 487: 46 Pac. 261. 1896.

The plaintiff and the defendant Olds together signed a promissory note payable to the Silver Bow National Bank of Butte. After renewals of the note, the plaintiff was obliged to pay the same. He then brought this action against all these defendants. The reason for joining these defendants other than Olds was that plaintiff claimed, and so alleged in his complaint, that, when the note was signed, the defendant Olds, together with defendants Hoffman, Northrup, Cox, Kountz, Whitefoot, Ferris, Cooper, and Hartman, constituted a partnership, which partnership was engaged in the business of operating the Kittie Morris Mine, and that the partnership was carried on in the firm name of L. B. Olds, and that the signature of L. B. Olds on the note in question was not the individual signature of Mr. L. B. Olds, but was the signature of said partnership. Upon this theory the case was tried. The plaintiff recovered judgment. The defendant Olds did not appear upon the trial, and the case proceeded as against the defendants other than him. Those defendants now appeal from the judgment, and from the order denying a new trial.

Hartman Bros. & Stewart and *Smith & Word*, for appellants.

F. T. McBride, for respondent.

De Witt, J. There are three alleged errors complained of, of which we shall treat. The first is the action of the court in treating the partnership as a general or trading partnership. This matter arose in several ways upon the trial, and in the giving of the instruc-

tions. It is not necessary to follow this error into every place where it occurred. It is sufficient to treat it as it occurred in instruction No. 3, which the court gave. That instruction is as follows: "The court instructs the jury that where several parties associate themselves together for the purpose of carrying on a business, and mutually agree to contribute funds for, and to bear losses and share the profits of, the business, that such an association constitutes a general partnership, and it is immaterial whether the business to be engaged in is mining or other business; and in such cases each partner becomes the agent of the partnership for the purpose of the partnership."

The appellants complain that by this instruction the court treated the partnership of the defendants as absolutely a general or trading partnership, and excluded from consideration the question of whether the defendants were a mining partnership. They contend that the court proceeded upon the theory that there was no such thing as a mining partnership in this State prior to the enactment of the Civil Code of July 1, 1895 (section 3350 *et seq.*). If this were the case, it was error, for mining partnerships, differing from general partnerships, have been recognized in the decisions of this court as existing in this State for many years. Nolan *v.* Lovelock, 1 Mont. 227; Boucher *v.* Mulverhill, Id. 306; Hirbour *v.* Reeding, 3. Mont. 15; Southmayd *v.* Southmayd, 4 Mont. 112; Galigher *v.* Lockhart, 11 Mont. 113; Harris *v.* Lloyd, 11 Mont. 406; Anaconda Copper Min. Co. *v.* Butte & B. Min. Co., 17 Mont. 523.

Respondent also contends that the court properly gave this instruction, for the reason that it appears from the evidence that there was no mining partnership in this case. We think that there was evidence tending, at least, to show that the partnership in question was a mining one, and not a general one. But the court instructed the jury, in No. 3, quoted, that if parties associate themselves together for the purpose of carrying on a business, and agree to contribute funds, pay losses, and share profits, such an association is a general partnership, without regard to whether the business is mining or not. We are of opinion that this was not correct, for, while these elements recited are those of a general partnership, they are certainly also elements of a mining partnership. In every partnership the parties associating themselves together contribute funds and share losses and profits. One partner may make his contribution in money, and another may make it in labor or in furnishing the mining premises to the partnership. One may bear the loss of money that he puts in; another may bear the loss of his time and labor which he contributes. We cannot imagine a mining partnership in which the parties do not share losses and profits. Certainly, no one will enter a mining partnership with the agreement that he shall pay all the losses, nor with the agreement that his partner shall receive all the profits. The facts recited in instruction No. 3 may be those of a general partnership,

but they are also part of the facts existing in a mining partnership; and it was error to hold absolutely that those facts constitute a general partnership only. It is true that a general partnership may exist if the contract between the parties is to that effect, even if the business of the partnership is solely in mines. Duryea *v.* Burt, 28 Cal. 574; Settembre *v.* Putnam, 30 Cal. 490; Decker *v.* Howell, 42 Cal. 636. It is held in Decker *v.* Howell, *supra*, that an agreement to share profits and losses equally tends to prove the existence of an ordinary partnership, instead of a mining partnership; but it is not there held that simply the sharing of losses and profits in itself constitutes absolutely a general partnership. The distinction between a general or trading partnership and a non-trading partnership is recognized, not only in the mining States, where mining partnerships are frequent, but in other jurisdictions where non-trading partnerships other than mining ones are of frequent occurrence. Many of the rules of general partnerships obtain in mining partnerships, but the latter have other rules peculiar to themselves. Some of the great distinctions between a general partnership and a mining partnership are the questions of the *delectus personarum*, and the authority of one partner to bind the firm by the issuance of commercial paper of the firm. As to joint owners operating a mine, it is said in Skillman *v.* Lachman, 23 Cal., at page 204: "They form what is termed a 'mining partnership,' which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business, without dissolving the partnership. Fereday *v.* Wightwick, 1 Russ. & M. 49. Still, there may be a partnership in the working of a mine subject to the rules relating to an ordinary partnership in trade. Story, Partn. § 82. And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties. Rock. Mines, 575. But in the case of an ordinary mining partnership something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership."

Mr. Justice Field said, in Kahn *v.* Smelting Co., 102 U. S. 645: "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present."

The learned justice then quotes with approval Skillman *v.* Lachman, above quoted. See also Quinn *v.* Quinn, 81 Cal. 14; McConnell *v.*

Denver, 35 Cal. 365; Jones *v.* Clark, 42 Cal. 180; Charles *v.* Eshleman, 5 Colo. 107; Higgins *v.* Armstrong, 9 Colo. 38; Judge *v.* Braswell, 13 Bush, 67; Manville *v.* Parks, 7 Colo. 128; Deardorf's Adm'r *v.* Thatcher, 78 Mo. 128; Pease *v.* Cole, 53 Conn. 53; Bissell *v.* Foss, 114 U. S. 252; Bates, Partn. § 163; also, Id. §§ 14, 329, with cases cited; Pars. Partn. § 37, with note; § 306, with note and § 85, and cases cited.

We are therefore of opinion that the court, in giving instruction No. 3, was in error, for the reason that the elements of a partnership there recited do not in themselves absolutely constitute a general partnership. . . . *Reversed.*

In re MARY AND BENJAMIN IRVING.

17 Nat. Bankruptcy Reg. 22. 1877.

E. T. Fellows, for the assignee.

W. F. Scott, for the creditor.

Blatchford, J. The notes in question being made by Wise and indorsed by Irving & Son, and taken by Wise to E. F. Mead to be discounted, and the money for them being given by Mead to Wise, the transaction showed on its face that the indorsements were only accommodation indorsements. E. F. Mead, and L. Mead through him, were, therefore, chargeable with notice that Irving & Son were only sureties for Wise, and that the notes had not passed through the hands of Irving & Son in the ordinary course of their co-partnership business; and, if Mary Irving did not consent to the making of the indorsements, she is not liable on the notes. Is there anything to repel the presumption which arises from the face of the transaction? It is for the creditor to show affirmatively sufficient to rebut the presumption. It is entirely clear that Mary Irving knew nothing of the indorsements, and did not consent to the making of them.

It is not shown satisfactorily that the indorsements were in any way for the benefit of Irving & Son, as a firm, or that any of the money paid for the notes was applied to the purposes of the firm or went into the hands of the firm. In view of the conflicting evidence of E. F. Mead and Charles Irving it cannot be regarded as established that E. F. Mead, or L. Mead through him, had any information before taking the notes and paying the money for them, that the notes or the indorsements were for the benefit, to any extent, of the firm of Irving & Son.

There is no doubt that E. F. Mead and L. Mead required the indorsement of Irving & Son before they would take the notes. But that is not sufficient. I cannot concur with the register in his finding that these notes were regularly indorsed by Irving & Son in accordance with the business transactions between them and Wise.

On the contrary, it distinctly appears that this was the first occasion on which Benjamin H. Irving had indorsed with the firm name any note made by Wise.

The proof of debt by L. Mead against the firm must be expunged.

NOYES ET AL. v. CRANDALL ET AL.

6 S. D. 460: 61 N. W. 806. 1895.

FULLER, J. In the village of Hartford, on the 20th day of February, 1893, the defendants were, and for a few months prior thereto had been, engaged in the banking business as co-partners, under the firm name and style of Merchants' Bank of Hartford, and during all such time F. S. McAllister, the cashier of said bank, was carrying on a retail drug business in the same town, under the firm name of F. S. McAllister & Co. On the above-mentioned date the following bill of exchange was drawn by the Bank of Hartford on its correspondent, the Merchants' Bank at Sioux Falls, of which the defendant Crandall was at the time president: "Merchants' Bank of Hartford. No. 486. Hartford, S. D., Feb. 20, 1893. Pay to the order of F. S. McAllister, or order, $800.00 (eight hundred dollars). Duplicate unpaid. F. S. McAllister, Cashier. To Merchants' Bank, Sioux Falls."

Plaintiffs are a co-partnership engaged in the wholesale drug business at the city of St. Paul, and during all the time F. S. McAllister was cashier of the Merchants' Bank of Hartford, and for more than a year prior thereto, he had been and was a customer of plaintiffs, and frequently made remittances to them for goods purchased for the purposes of his retail drug trade in the village of Hartford. While defendants were operating their bank, and prior to the 25th day of February, 1893, numerous drafts of the Merchants' Bank of Hartford on the Merchants' Bank at Sioux Falls, payable to the order of plaintiffs, and signed "F S. McAllister, Cashier," were sent by McAllister in payment for goods, and were all honored by said correspondent as soon as presented. On the day and date last above mentioned, and at the request of defendant McAllister, made in person at the office of plaintiffs, in the city of St. Paul, he received from plaintiffs $539.87 in cash and a credit of $260.13 on account, and indorsed and transferred to them in consideration therefor the above-mentioned bill of exchange, which was presented and protested for non-payment three days thereafter, and this action was instituted by plaintiffs to recover from the defendants the amount of said draft, together with protest charges and the costs of the suit. There being no service of the summons upon defendant McAllister, the action proceeded against the defendant Crandall, and at the conclusion of plaintiffs' evidence a verdict on motion was directed in favor of the defendant served and against the plaintiffs for costs. From a judgment

entered thereon, and from an order overruling a motion for a new trial, plaintiffs appeal.

With great confidence counsel for respondents maintain that a draft drawn by a cashier to his own order is not negotiable, that a purchaser thereof for value is not an innocent holder without notice, and that the same is utterly void as against the bank. As no evidence was offered on the part of defendants, and in the absence of anything in the record tending to show that the draft was not in fact paid for by or charged to the account of the cashier at the time he drew the same, the foregoing position must be justified in order to sustain the judgment from which the appeal is taken. The trial court excluded and withheld from the jury the evidence of numerous persons of extensive experience in the banking business, both in this State and in the monetary centres of other States, who testified, in effect, that it was, under certain circumstances, usual and customary for cashiers to make drafts like the one in suit to their own order upon correspondent banks, and that such drafts are received by bankers without hesitation on that account, and are treated in the course of business as current funds; and the rulings of the learned court upon the offer of this evidence are assigned as error.

If a partnership created for and engaged in the banking business appoints, designates, and holds out to the world a member thereof as cashier, it thereby authorizes such person to transact on its behalf all business within the inherent powers of a bank cashier; but, in order to ascertain the scope and extent of his authority to bind his bank, we must look to and be governed by the law and the decisions in determining whether a particular act has received judicial sanction, and is justified and sustained by the courts. That the draft was made payable to the individual who signed it as cashier, though sufficient to put third persons upon inquiry, and raise a presumption that he was attempting to appropriate to his private use money belonging to the bank, might not be sufficient to relieve defendant Crandall from all liability in case it should clearly appear that he had authorized McAllister to pay his individual debts to the plaintiffs out of the funds of the bank, or had sanctioned such conduct by habitually and knowingly permitting him to make drafts from time to time to their order, and for that purpose, upon the Merchants' Bank at Sioux Falls, of which bank said Crandall was president, and by which bank such drafts were promptly honored when presented for payment; and thus the question might become one of fact as well as of form.

It appears from the evidence that plaintiffs knew that McAllister was cashier of the Merchants' Bank of Hartford, and that he had frequently made remittances to them for goods which he had purchased by drafts issued by the Merchants' Bank of Hartford to the Merchants' Bank of Sioux Falls, signed "F. S. McAllister, Cashier," and that such drafts were in every instance promptly honored when presented for payment. If plaintiffs then knew, or, under the circumstances, ought to have

known, that by using his official character McAllister was paying his personal obligations out of the funds of the bank deposited with the Merchants' Bank at Sioux Falls, the fact that the drafts were made by McAllister payable to their order, instead of being made to his own order, and indorsed over to plaintiffs, would not be material. If they were made for his own personal use, without authority, their payment in either case could be enforced; and, as the drafts so drawn, paid, and cancelled were in the possession of the defendant Crandall, who produced and offered them in evidence at the trial in obedience to an order of court, we are disposed to believe that such evidence, together with other facts and circumstances bearing upon the question of authorization, should have been submitted to the jury for its determination.

Mr. Morse, in the first volume of his treatise on Banks and Banking, at page 98, says: "If A. openly and for a long time does certain things without special authority, and there is no objection from the directors, C. properly infers A.'s authority; for, if the directors knew of A.'s conduct, it is a clear case of estoppel, and, if this action was so open and long-continued that they would have known of it by reasonable diligence, the bank cannot take advantage of the neglect of its agents in their duty as against one misled and injured thereby." In Anderson *v.* Kissam, 35 Fed. 699, cited by respondents' counsel as a case in point, the court says: "The facts in evidence certainly justified the submission of the question to the jury whether the defendants did not have notice that Warner was availing himself of fiduciary powers to use the funds of the corporation for unauthorized purposes. As the checks were made payable to the order of the defendants for Warner's individual use, in legal effect they were made payable to Warner's own order. The defendants knew that he was not acting within the scope of any ordinary agency when he made checks officially for use in his private transactions."

A course of dealing between McAllister and the plaintiffs through the bank owned by Crandall and himself might be of such a character as to establish an obligation on the part of the partnership to pay the draft in suit, and, conceding that its recitals were *prima facie* sufficient to raise a presumption that he was attempting to defraud his co-partner, such presumption would not be conclusive, and plaintiffs would be entitled to prove that McAllister was in fact authorized to make the draft as he did, or that he had in fact paid for the same at the time it was drawn. 1 Morse, Banks, 27; Hotchkiss *v.* Bank, 42 Barb. 517; Rutledge *v.* Squires, 23 Iowa, 53; Hickman *v.* Kunkle, 27 Mo. 401; 1 Lindl. Partn. 171. The case of Anderson *v.* Kissam, *supra*, to which counsel for respondents direct our attention, has been carefully examined. In that case defendants knew that the numerous checks drawn by the cashier in his official capacity upon the correspondents of his bank were so drawn for his personal use, and as defendants drew the money on their checks, and used it for the cashier in his speculations upon Wall Street, the court held, in an action against the defend-

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ants by a receiver of the cashier's bank, brought to recover such money, that it was proper for the jury to ascertain from the evidence whether the directors of the bank were ignorant of the fact that the cashier was so using the funds of the bank, and that the jury was fully warranted in finding that the directors of the bank were entirely ignorant of the cashier's acts, and that defendants knew, or had reason to believe, when they took the checks, that the cashier was not authorized by his co-managers to make them. These facts, together with other circumstances offered on the part of the defendants, and bearing upon the question of the knowledge of the directors and the authority of the cashier to speculate on his own behalf with the funds of the bank, having been submitted to the jury, and found adversely to the defendants, the court, on appeal, sustained an order denying a motion for a new trial.

While the fact that the draft in suit, viewed in the light of the law, raises a presumption that it was drawn without authority, we think there were facts and circumstances in evidence tending to overcome this presumption, and bearing upon the question of knowledge and acquiescence on the part of defendant Crandall, which were sufficient to go to the jury under proper instructions relating to the subject of authority.

The judgment is therefore reversed, and a new trial is ordered.

DAVIS *v.* DODSON ET AL.

95 Ga. 718: 22 S. E. 645. 1895.

LUMPKIN, J. The plaintiff below, Davis, as executor of Hall, sued out an attachment against Dodson & Moon, a non-resident firm of attorneys at law, which attachment was levied upon land in Walker County as the property of Moon, one of the defendants. The case made by the declaration in attachment as amended was, in substance, as follows:

The defendants, as attorneys at law, received for collection from the plaintiff's testator a promissory note, at the same time giving him a receipt in the following words: "Chattanooga, Tenn., Dec. 23, 1886. Received of S. P. Hall a note on Larkin Payne, payable to E. M. Dodson, and indorsed by him, for fifteen hundred dollars, dated the 7th day of March, 1886, and due twelve months after date, with interest at the rate of seven per cent per annum from date, and secured by a deed of trust on two hundred and thirty acres of land, the home place of said Payne, made to said Dodson as trustee, with power of sale. If said note is not paid at maturity we agree to foreclose the deed of trust by the first Tuesday in May, 1887, free of cost to Mr. Hall, and not to charge him any fees, this being the agreement under which he pur-

chased said note and deed of trust. Dodson & Moon, Attys. at law. The money due upon the note specified in the foregoing receipt was collected by the defendants, who failed and refused to pay the same over to the plaintiff."

The defendant Moon pleaded, in substance, that he did not sign the receipt; that it was not signed by any one authorized by him; that neither he nor the firm of Dodson & Moon, as such, ever had the possession, custody, or control, for collection or otherwise, of any such note or paper as was described in this receipt; nor did he or his firm, at any time or in any manner, collect or receive any money thereon, either as attorneys at law or otherwise; but that the giving of the receipt was the individual act of Dodson, for which neither Moon nor the firm was in any manner responsible.

At the trial the plaintiff offered evidence to show that the receipt in question was signed by Dodson in the name of his firm, and that he afterwards collected the money due on the note, giving therefor receipts signed by him individually, and had failed to account for the money collected. No evidence whatever was introduced to show that Moon ever had any knowledge of the transaction, or had ever ratified the giving of the receipt to Hall. Nor was it shown that Moon ever had personal possession of the note, or recognized its possession by his firm, or that he took part in or knew of its collection by Dodson. On the contrary, as the receipt itself would seem to indicate, the truth of the matter probably was that Dodson traded to Hall a note payable to himself, and which he held in his individual capacity; and, as an inducement to Hall to purchase the same, undertook by the receipt to bind the firm of Dodson & Moon to collect the note free of charge. If the effect of giving the receipt was to obligate that firm to perform the service indicated, it is obvious that it would make no difference that Moon never took any active part in, or even knew of, the collection and misapplication of the money due on the note, for he would be responsible and liable for every act of Dodson while acting within the scope of his authority as a member of the partnership. Therefore the question presents itself whether Dodson, by virtue of his general authority to represent his firm, could, in a transaction such as that disclosed by the record now before us, make a contract binding alike upon his partner and himself as composing the firm of Dodson & Moon.

We do not see how it can be seriously contended that it is within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone and not shared in by his partner, to undertake to bind his firm to any agreement whatsoever. In a transaction of this kind, he would be acting solely in his individual capacity, and not as a member of his firm. We had thought it a very universally recognized fact that lawyers are in the habit of charging their clients for services, and that the main object of forming law

partnerships was the avowed purpose of reaping a goodly harvest of fees. In fact, complaint has frequently been made that lawyers are sometimes too diligent and overzealous reapers. But in all seriousness it would defeat the very object for which a law partnership was formed if one of its several members were allowed, without the express assent of the others, to undertake to bind the firm to perform legal services without compensation either for the actual time and labor necessary to be expended, or for the responsibility and liability the firm would incur by the undertaking. Certainly it is the right of an attorney, acting for himself alone, as a matter of charity or friendship, to collect a paper for another without charging a fee for his services; but the present case sufficiently demonstrates how serious and unjust a matter it would be if an attorney were permitted to thus bind his partner, without his consent, and with no remuneration for the risk incurred. We have yet to see the rare spectacle of an attorney at law, or a firm of them, rendering professional services gratuitously as a recognized and customary incident of the business in which they engage. We have long ago departed from the *honorarium* from which our ancient ancestors in this noble profession either wholly or partially derived their means of subsistence.

Under the facts shown on the trial, therefore, we have no hesitancy in saying the plaintiff failed utterly to make out a case.

Judgment affirmed.

ALSOP *v.* CENTRAL TRUST CO.

38 S. W. (Ky.) 510. 1897.

ACTION[1] by the Central Trust Co. against Griswold and Alsop, as partners, for $200 and interest claimed to be owing under a lease. Plaintiff's petition set forth the lease, which was executed by the company as lessor, and, in the name of Griswold & Alsop, by Griswold, as lessees. The petition contained no allegation as to the nature of the partnership between the defendants, nor any as to Griswold's authority to execute the lease for the firm, but did allege that defendants used and occupied the premises during the entire term of said lease, and had paid nothing therefor.

Defendant Alsop demurred to the petition; the demurrer was overruled and plaintiff had judgment. Defendant appealed.

R. A. Miller and *Little & Little*, for appellant.

J. D. Atchinson, for appellee.

BURNAM, J. . . . Partnerships, when considered with reference to the business in which they are engaged, may generally be divided into two classes, one of which is known as "trading" or "commercial"

[1] The statement of facts is abridged, and a part of the opinion relating to a question of practice is omitted.

partnership, and the other as "non-trading" or "non-commercial" partnership. Any member of an ordinary trading partnership can bind the firm by the signing of the firm name in the usual course of business, as a part of the usual routine of their affairs, irrespective of restrictions in the articles of partnership not brought to the knowledge of the payee. In a non-trading partnership, however, — that is, a partnership engaged in some occupation which is not of a commercial character, — a partner does not generally possess the power to bind the firm, and the extent of his powers is not fixed by the rules of law. The general rule is that the partners in such a firm have no implied power to bind the partnership, but each case is left to be decided upon its particular facts; and one who seeks to hold the firm bound upon a contract made by a single member must be able to show such acts as will warrant the conclusion that the partner had been invested by his co-partner with the requisite authority to make the contract. The distinction, as set out by Judge Cofer in the case of Judge *v.* Braswell, 13 Bush, 75, is that in a commercial partnership the extent of a partner's power to bind the firm is a question of law, while in the non-commercial firm the power of one partner to bind his co-partner is a question of fact, and the burden of proof to establish the facts as to the validity of contracts so executed by one member of such a partnership rests with the party claiming to hold the firm liable. Therefore it follows that, in order to recover upon written obligation, signed in the firm name by one of the partners of a non-trading partnership, it is necessary for the plaintiff to allege affirmatively the nature of the partnership, that the obligation was executed for something necessary for the transaction of the business of the firm, or that said partner was expressly authorized to make the contract by the terms of the partnership. In the case at bar, plaintiff's petition fails to make any of these necessary allegations. We are therefore of the opinion that the demurrer to this paragraph should be sustained, with leave to plaintiff to amend same to conform to the views of the court herein indicated. . . .

Judgment reversed and case remanded.

RAPP *v.* LATHAM ET AL.

2 B. & Ald. 795. 1819.

ACTION for money had and received. Plea, first, general issue; secondly, set-off. This action was brought by order of the Lord Chancellor against the defendants, who were bankrupts, and was defended by the assignees. The question was, whether the plaintiff was entitled to prove any and what debt under the commission. The two defendants were in partnership as wine and spirit merchants. The business was under the sole direction and management of Parry, Latham being

also an insurance broker. The plaintiff employed the defendants to purchase wine for him on commission, and to resell the same as opportunity might offer. The plaintiff advanced the money to pay for the wines, and the duties thereon. The defendant Parry represented to the plaintiff that wines were actually purchased and sold, and from time to time rendered, in the name of Latham & Parry, accounts of such sales, and paid the proceeds thereof to the plaintiff. These dealings commenced in January, 1812. Parry then wrote to the plaintiff that he had an opportunity of purchasing sixty-one pipes of port at £65 per pipe, and he desired the plaintiff to remit the money to pay the price of such wines and the duties thereon: the plaintiff did remit the money, and Parry represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that thirty of these sixty-one pipes were resold at the price of £84 per pipe, and paid the proceeds of such pretended sale to the plaintiff. The other transactions were similar to this, and continued from January, 1812 to 1813; during that time Parry represented that eleven different purchases of wine had been made. Each transaction formed the subject of a separate account, and all the purchases were described as being made *at a certain specified rate per pipe*. The plaintiff conceived that Parry was in fact laying out his money in *bona fide* purchases of wines, and that he actually resold part of such wines as he represented; but upon the bankruptcy taking place, it appeared that the transactions were wholly fictitious, and that Parry had had recourse to them as expedients to raise money. The defendant Latham knew that the plaintiff had employed Parry to buy and sell wines on commission, but he had no knowledge that the tranactions were fictitious. Upon the whole account the plaintiff had advanced, on account of the alleged purchases of wine, and some other purchases of rum, about which there was no question, £126,000, and he had received, on account of the supposed resale of part of the wines and the profits thereon, £130,000. He claimed to recover the money he had advanced for the purchase of that part of the wine which the defendant Parry had represented as purchased, and which they had never, in fact, delivered or resold. The cause was tried at the London Sittings after last Hilary Term, before ABBOTT, C. J., and it was contended by the plaintiff that he had a right to take each transaction separately, and to charge the defendants with the amount of the money advanced to them, for the purchase of every pipe of wine not accounted for.

The LORD CHIEF JUSTICE was of opinion that, in this action for money had and received, the plaintiff could not recover, as the defendants had in fact received no money beyond what they had actually paid to the plaintiff, and the plaintiff was therefore nonsuited, with liberty to move to enter a verdict for such sum as an arbitrator should award, on a principle to be laid down by the court. A rule *nisi* having been obtained for that purpose by *Scarlett* in Easter Term last, cause was shown on a former day in this term by

Vaughan, *Serjt.*, *Gurney*, and *Littledale*, for the defendants.
Scarlett, *Marryat*, and *Tindal*, *contra.*

Abbott, C. J., now delivered the judgment of the court. This case has been so recently argued, that it is not now necessary to state the circumstances of it, and it will be sufficient to observe, that according to the accounts rendered to the plaintiff, the supposed purchases were all alleged to be made at certain specified rates *per pipe or hogshead*, so that each transaction, if real, was divisible in its own nature. Upon consideration of the case, we are of opinion that the defendant Latham is bound by the acts and representations of his partner Parry, and cannot be allowed to say that those transactions were fictitious which Parry represented to be real, whether such representations applied to the sale of the whole number of casks supposed to have been purchased at one time, or to a part only of such number. The consequence of this will be, that the plaintiff is entitled to retain, without account, all the money that has been paid to him upon these fictitious transactions, as he would have been if the transactions had been real, and is entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as therefore had and received by the defendants to his use. The nonsuit therefore must be set aside, and a verdict entered for the plaintiff for the sum which shall be found due upon the principle which I have mentioned, which is the mode most favorable for the plaintiff.

Rule absolute.

HARRISON *v.* JACKSON ET AL.

7 D. & E. 207. 1797.

This was an action of covenant upon an agreement of three parts stated in the declaration to have been made on the 10th of July, 1794, between the defendants, describing them as merchants and partners, of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part, of one part of which said agreement, as being sealed with the seal of the said W. Sykes for himself and the other two defendants, the plaintiff made a *profert* in court. The declaration then stated the agreement and covenant of the defendants, the subject matter of which agreement and covenant appeared on the agreement to be a partnership transaction on the part of the defendants, and to have been entered into on a full and valuable consideration received by them as partners. The declaration then stated the breach of covenant, whereby the plaintiff had sustained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Issue being joined, the cause was tried at the sittings after Hilary Term, 1797, before Lord Kenyon at Guild-

hall, when the jury found a verdict for the plaintiff, damages £477 13*s.* 9*d.*, and costs 40*s.*, subject to the opinion of this court on the following case.

The defendants were partners. The agreement stated in the declaration was produced; and the subscribing witness proved that it was executed in his presence by the defendant Sykes in the following form: "For Jackson, Self, and Rushforth; W. Sykes." But neither Jackson nor Rushforth was present at the execution. The question for the opinion of the court was, whether such execution of the agreement by the defendant Sykes were binding on the other defendants, Jackson and Rushforth.

Dampier, for the plaintiff.

Giles, for the defendants.

Lord Kenyon, C. J. I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject: the parties came to *nisi prius* with the facts admitted on both sides; for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *nisi prius* case cited,[1] the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed: but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world: if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners.

Postea to the defendants.

STRAFFIN *v.* NEWELL et al.

T. U. P. Charlton (Ga.), 163. 1808.

This was an action of covenant brought upon a charter party, signed and sealed thus: "Thomas and Robert Newell." A verdict has been rendered for the plaintiff, and a motion is now made to arrest the judgment, upon the ground that one partner cannot execute a deed to bind the other.

[1] Mears *v.* Serocold, sittings in Easter Term, 1785, at Guildhall, cited by Dampier.

Davis & Berrien, for the motion.

Leake against it.

CHARLTON, J. The point for the decision of the court is, whether one partner can bind another by deed?

The general principle of the law is, that all partners are bound by what one of them does in the course of the business; for *quoad hoc*, each partner is considered as the authorized agent of the rest, and all are respectively implicated, and each becomes liable to the fullest extent, in such trade or business. Law of Partn. 105, Davies' Bank. Law, 8.

It is said that partnerships embrace only chattel interests, and the free disposition of these requires not the solemnity of deeds or indentures. The right of one to bind the interests of all is wisely restrained within the limits of personal estate, and it is with a view to this, that partners are allowed to bind each other by deed. Amer. Lex Mer. 437. It is also laid down in the case of Gerard *v.* Basse, 1 Dallas Rep. 119, that "one partner cannot execute a deed for another."

But the case principally relied on by Davis and Berrien, is Harrison *v.* Jackson, 7 T. R. 207, where it is said by Lord Kenyon, C. J., "that the law of merchants is part of the law of the land. And in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted, but that one partner might bind the rest. But the power of binding each other by deed is now, for the first time, insisted on except in the *nisi prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety."

I have given to this case, and to all others I have had opportunity of inspecting on this subject, the most attentive investigation; and whilst I assent to the general propositions of Lord Kenyon and Shippen, I do not conceive that they apply to the mercantile transaction of a charter party. It does not say in this case of 7 Term Rep. upon what kind of agreement covenant was brought, and I can find no cases of actions upon charter parties where the question was directly involved, as it relates to the signature of the partners; but there is a case in point as to the liability attached to both or all of the owners of a ship by the signature and seal of one.

It is thus stated in Beanes' *Lex Mercatoria*, who cites 2 Rolls. Abr. 22, "If an indenture of charter party be made between A. and B., owners of a ship of the one part, and C. and D., merchants of the other part, but in the indenture it is mentioned that A. and B. covenant with C. and D., and C. and B. covenant with A. and B., in this case A. and B. may join in an action *vs.* C. and D., though B. never seals the deed, for he is a party to the deed, and C. and D. have sealed the other parts to B. as well as to A." Beanes' *Lex Merca.* 183.

If one of the freighters or owners of a ship, who are *quoad hoc* partners, can bind the other by his seal, *a fortiori*, the signature and seal of one merchant then can bind the other in this species of mercantile contract; because in the one case there is only a special, and in the

other a general partnership, the principles of which are more liberal and extended.

I bottom my decision upon the broad ground that a charter party is exclusively a mercantile transaction, and always in the course of trade. The general proposition of Lord Kenyon must refer to deeds not in the course of trade. I mean a deed so inseparably incidental, so closely blended with partnerships and mercantile pursuits, as the contract of charter party is. A charter party is as essential in the course of trade, as the negotiation of bills of exchange; and I can perceive no difference between the exigencies which would impose a liability in the one case, and destroy it in the other. This contract could not have been in the contemplation of judges when they decided that one partner could not bind the other by deed. The silence of the books, when it is supposed that many cases might have occurred, affords the strongest reason to believe that the deed of charter party is not within the general principle stated by Kenyon and Shippen. The deeds they speak of are those which reach the separate estates of the partners, are unconnected with the partnership, or have no relation to the course of trade. A charter party has so peculiar a view to mercantile matters and ideas, that all the parties covenanting become liable in a given extent, as partners according to the law merchant, Law of Partn. 89, and like all mercantile contracts, it ought to have a liberal interpretation. Doug. 277. I have consulted some merchants on this subject, and they inform me, that it is customary either to sign the name of the firm, or for one partner first to sign his own name, and then add "for self and other partners," mentioning their names. Still, however, there is but one seal, and the signature is by one. I have also examined a printed precedent, and I find it is signed and sealed in the manner of this, which illustrates the understanding of writers on the subject.

The motion in arrest of this judgment is therefore overruled.

THE ATTORNEY-GENERAL *v.* STRANYFORTH ET AL.

Bunbury, 97. 1721.

An English information was brought by the attorney-general, setting forth that Nicholas Skinner, in the year 1710, for himself and company, imported 117 tons and 13 gallons of Gallicia wine, and upon application to the custom house obtained a sight; in pursuance of which the officers appointed to view certified, by indorsement on the order of sight, that 33 tons were so damaged as to be only fit to make spirits or vinegar, and sunk one-third in value; the agent of Skinner entered the said wines for Skinner & Co. in the custom house, and, by a mistake of the clerk in the office, the whole 33 tons was allowed for damage, though no more than one-third of the 33 tons was intended to be allowed by the

commissioners; so that the crown was, by mistake, defrauded in its duties £535, and the discovery being made about the year 1715, this information was brought, which prayed that the defendants (being five) might make good this deficiency; and the court decreed accordingly, that though the importation and entry was only by Skinner, yet all the partners who were so at the time of the importation, were liable in the whole to the crown; and the decree was drawn up, that the defendants should pay the said sum to the crown, as Mr. Attorney-General should think fit.

ASHWORTH v. STANWIX ET AL.

3 E. & E. 701: 7 Jur. N. S. 467. 1860.

Crompton, J. The question to be determined in this case is, whether the defendant Stanwix, being co-proprietor with the other defendant Walker of a mine, is jointly liable with him for an injury sustained by the plaintiff, a workman in their common employ, through the negligence of Walker. The facts are such that, if Walker had been simply the fellow-workman of the plaintiff, the case would have come within the principle that a servant, sustaining injury from the negligence of a fellow-servant engaged in the same employment, cannot recover against the common master. The present case would have been quite analogous to that of Bartonstill Coal Co. v. Reid, 3 McQ. Sc. App. Ca. 266. But the present case is distinguishable from the class of cases which have been referred to, in the important particular that the defendant Walker, although in fact engaged jointly with the plaintiff in the work of the mine, was also a co-proprieter, and, as such, one of the plaintiff's masters; and the question is, whether this circumstance takes the case out of the before-mentioned rule, and calls for the application of a different principle. We are of the opinion that it does, and that the plaintiff is entitled to hold the defendant Stanwix responsible for the negligence of his co-proprietor and partner.

The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master, he is entitled to expect care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on

himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow-laborer. Though engaged with the plaintiff in a common employment, Walker did not the less remain the master of the plaintiff and the partner of Stanwix. This being so, it follows that Stanwix must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between Walker and Stanwix; and as the negligence was a matter within the scope of a common undertaking, we think that Stanwix is equally liable with Walker. That a partner is liable for the negligence of his co-partner when engaged in the business of the partnership is not only clear in principle, but is established by the case of Moreton *v.* Hordern, 4 B. & C. 223, in this court, where two proprietors of a stage-coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. Personal negligence is clearly established against Walker; and it being admitted that Stanwix was his partner, the latter must be held jointly responsible in respect of such negligence, and is therefore liable in this action. The rule must be made absolute to enter the verdict against him, as well as the other defendant.

BRUNDAGE *v.* MELLON.

5 N. D. 72: 63 N. W. 209. 1895.

CORLISS, J. Defendant was sued as surviving member of the firm of Mellon Bros., for deceit in the sale of horses by such firm to plaintiff. On the trial, plaintiff sought to establish the allegations of the complaint as to fraudulent representations connected with such sale by offering to prove that the member of the firm who was dead at the time of the trial had, in effecting the sale, made certain representations touching the soundness of the horses sold. The evidence was excluded by the trial court, plainly on the ground that one partner is not liable for the fraudulent representations of his co-partner in effecting a sale of partnership property. This is not the law, and, on principle, it ought not to be the law. Although a few courts have taken a different view of the question, there is ample authority to support the rule which renders all the members of the firm liable for the tort of one of its members under such circumstances. 1 Bates, Partn. § 472; Chester *v.* Dickerson, 54 N. Y. 1; Mechem, Ag. § 743; Wolfe *v.* Pugh, 101 Ind. 293; Story, Partn. § 108; Strang *v.* Bradner, 114 U. S. 555; Locke *v.* Stearns, 1 Metc. (Mass.) 560; Jewett *v.* Carter, 132 Mass. 335. See also Haney Manuf'g Co. *v.* Perkins, 78 Mich. 1; Stanhope *v.* Swafford, 80 Iowa, 45.

Our Code settles the law in this State. The liability of one partner for the act of another partner is declared by section 4052, Comp. Laws, to be governed by the title relating to agency; and when we turn to that title, we find it there clearly asserted that the principal is liable for the wrong of the agent when committed by him in and as a part of the transaction of the business of the principal. Comp. Laws, § 3997. The offer of the plaintiff by the questions he asked was to prove a representation made by the deceased partner in and as a part of the transaction of the business of his principal; i. e., the other partner, the defendant in this case. The offer was to prove that the representations were made in connection with a sale of partnership property, and as a means of effecting such sale. It is obvious that the trial court ruled out the evidence on the theory that the defendant was not liable for the deceit of the deceased partner, as the ruling followed a statement by plaintiff's counsel in answer to an inquiry by the court touching the nature of the action as disclosed by the complaint, that it was not an action for breach of warranty, but for deceit. . . .

The judgment of the District Court is reversed, and a new trial ordered. All concur.

HOBBS ET AL. v. CHICAGO PACKING &c. CO.

98 Ga. 576: 25 S. E. 584. 1896.

THE Chicago Packing & Provision Company brought bail trover against Hobbs & Tucker for certain meat. The defences were, in brief, that defendants had committed no tort for which this action would lie, and, if they were liable at all, it was only upon a contract of guaranty; and that Hobbs, although a member of the firm of Hobbs & Tucker for the purpose of doing a banking business (collections, deposits, loans, and nothing else), really had no interest in the firm, and had no connection with or knowledge of the transactions involved in this case. The jury found for the plaintiff, and defendants' motion for a new trial was overruled.

W. T. Jones, *Wooten*, & *Wooten*, and *J. W. Walters*, for plaintiffs in error.

P. H. Pope, *contra.*

LUMPKIN, J. 1. A wrong delivery of goods, either negligently or wilfully made, by one who had been intrusted with the custody of them, is in law a conversion by the latter. This rule has been applied to carriers of goods. Railway Co. *v.* Sloat, 93 Ga. 803. In principle, it is alike applicable to the defendants in the present case. There was ample evidence to warrant the jury in finding that the meat of the Chicago Packing & Provision Company was, by its indorsement of the bills of lading, in effect delivered to Hobbs & Tucker, to be by them delivered to Ragan upon his paying for the same, and not otherwise.

According to the verdict, the defendants violated the trust reposed in them; and, this being so, they ought to make good the loss sustained by the plaintiff on account of their unauthorized and unlawful conduct.

2. There was some evidence tending to show that the plaintiff had accepted a guaranty from Hobbs & Tucker that some of the meat which had already been delivered would be paid for, and that, therefore, the plaintiff's action should have been brought upon the defendants' breach of contract, and not in tort. We think, however, that, taking the evidence as a whole, it establishes the fact that, when this guaranty was accepted, the plaintiff was in utter ignorance of the fact that the meat to the price of which the guaranty related had been actually delivered to Ragan. The plaintiff was evidently under the impression at the time this guaranty was accepted that the meat still remained in the cars or in the railroad depot under the control of Hobbs & Tucker; and it is apparent that, in agreeing to ship more meat upon Hobbs & Tucker guarantying payment of that already shipped, the plaintiff simply intended to expedite the delivery of the latter and the collection of the money due them for the same, they supposing that Hobbs & Tucker would see to it that Ragan came up with the cash within the time limited in the guaranty, but never contemplating that he should get the meat without paying for it.

3. It seems that the meat was delivered to Ragan upon orders signed by Tucker alone, and it was therefore urged that Hobbs was not liable. Under the facts, the act of Tucker in giving these orders was really an act of the partnership. It was the same, in effect, as if he had gone to the station agent, and personally directed him to let Ragan have the meat; and it is evident that the agent thus treated and regarded the orders sent by Tucker. It can hardly be doubted that the act of Tucker in causing the delivery to be made to Ragan was within the scope of the partnership business; and consequently, whether it was done with the knowledge and consent of Hobbs or not, he was in law liable. "Each partner being the agent of the firm, the firm is liable for his torts committed within the scope of his agency, on the principle of *respondeat superior*, in the same way that a master is responsible for his servant's torts, and for the same reason [that] the firm is liable for the torts of its agents or servants." 1 Bates, Partn. § 461. "Where one partner, in a matter connected with the business of the partnership, does an act to the injury of a third person, which is a tort by construction or inference of law merely, his co-partner is equally liable with him for the consequences of the act." Myers *v.* Gilbert, 18 Ala. 467. See also Witcher *v.* Brewer, 49 Ala. 119. "Partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his co-partners." Bane *v.* Detrick, 52 Ill. 20. "Where a partner, in the course of partnership business, commits a fraud, or does acts prohibited by law, the firm is liable, although the other partners have no knowledge of such fraud or illegal

act." Tenney *v.* Foote, 95 Ill. 100. "The appropriation or misapplication by one partner of moneys or other property in the custody of the firm, within the scope of its business, or in the custody of such partner as a representative of the firm, renders each partner liable to the true owner for such conversion; and, when thus in the custody of one partner, it is immaterial whether the other partners knew anything about it or not." 17 Am. & Eng. Enc. Law, 1070. See also Alexander *v.* State, 56 Ga. 478.

4. We find no reason for setting aside the verdict in this case. It was fully warranted by the evidence, and no material error of law was committed on the trial.

Judgment affirmed.

GILRUTH *v.* DECELL.

16 So. 250: 72 Miss. 232. 1894.

Bill in chancery, reciting that complainant was in 1892 the wife of T. F. Decell, deceased, who was then a member of the firm of Gilruth & Decell; that at that time she was the owner of a house and lot in Jackson, Miss.; that she sold same, and that $1,600 of the purchase money was placed to her credit in the Capital State Bank of Jackson; that the amount was withdrawn from said bank on a check drawn January 11, 1892, in favor of the Bank of Yazoo City; that to said check complainant's name and that of T. F. Decell were signed; that complainant's signature was forged by T. F. Decell; that she was ignorant of the forgery for some months thereafter, and that she left her husband in March, 1893, and that he was killed soon afterwards, and that T. J. Moore was the administrator of his estate; that J. N. Gilruth, as surviving partner, after qualifying as required by law, took charge of the partnership property, and is now administering the same; that the $1,600 obtained by the forgery was placed to the credit of T. F. Decell in the Bank of Yazoo City, and was checked out by him for his individual use; that on the 16th of February, 1892, he checked on said deposit in favor of Gilruth & Decell for $500, which sum was placed to the credit of T. F. Decell on the books of Gilruth & Decell as capital paid in by him to complete the amount to be contributed by him in the firm of Gilruth & Decell; that said sum of $500 is still in the firm of Gilruth & Decell, and has gone into the hands of the surviving partner; that the removal and conversion of said sum of money by said T. F. Decell was a fraud upon complainant, and that said Decell held same as trustee *ex maleficio;* that complainant is entitled to have said sum of $500, mingled with the firm assets of Gilruth & Decell, repaid to her out of the firm assets in preference to all other claims against said assets, with interest from the date it was withdrawn. The bill makes Gilruth, as surviving partner, the only defendant, and prays

that the court will decree that the said sum of $500 was her money, and was held in trust for her, and went into the firm of Gilruth & Decell impressed with said trust, and that it be refunded her out of the firm assets. The court sustained demurrer to this bill, from which complainant appealed.

Barnett & Thompson, for appellant.

E. E. Baldwin, for appellee.

WHITFIELD, J. It is not alleged in the bill that Gilruth actually participated in the fraud by which Decell converted the trust fund to his own use, and afterwards paid it into the firm in payment of the balance of his subscription to its capital stock; nor that he had any actual knowledge of anything done by Decell in connection therewith. The acts and doings of Decell throughout were wholly outside the scope of the partnership business. Under the circumstances, while there may be some cases to the contrary, — as Palmer *v.* Scott, 68 Ala. 382, and Welker *v.* Wallace, 31 Ga. 362, — it is well settled in Mississippi, Pickels *v.* McPherson, 59 Miss. 216, and generally, that a bill cannot be maintained against the firm to recover from it the trust fund thus put by the guilty partner, without participation or knowledge on the part of the others, into the assets of the firm. Knowledge of the guilty partner in such case is not the knowledge of the firm. Liability of the other partners in such case, if it exist, must grow out of participation, as joint wrongdoers, in the fraud, and not out of the fact that they are partners, or their liability as partners. Bates, Partn. § 481; Evans *v.* Bidleman, 3 Cal. 435; 1 Lindl. Partn. *142, *143.

Jessel, M. R., thus emphatically puts it in Williamson *v.* Barbour, 9 Ch. Div. 535, 536: "When we come to a question of fraud, different considerations arise. It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm. A very obvious instance . . . may be shown, and is best shown, by an example. Suppose there is a firm with half a dozen partners who have a clerk, and the clerk has been in the habit of receiving presents from one of the sellers to the firm in order to pass goods of short weight, and further suppose that the clerk, not having been found out, is taken into partnership as a junior partner and continues the practice. Is it to be imagined, under these circumstances, that in a court of equity the other partners could not sue the vendor of the goods for the fraud, and not only sue him but their partners also? . . . I emphatically deny that any such doctrine could by any possibility be laid down by any judge, and I need not say it has never been laid down. Of course fraud must be an exception. I put the case of a clerk knowing it before he became a partner, and not interfering with it afterwards. But it is immaterial that the knowledge was acquired during the partnership. . . . It appears to me that that kind of notice will not do when it is applied to cases of fraud." And says Lindley: "If one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and there-

fore, to affect the other partners with a breach of trust, further evidence must be adduced." It is not within the scope of the bill to subject Decell's interest in the partnership assets. Besides, his administrator is not a party. Robertshaw *v.* Hanway, 52 Miss. 713, 717.

The decree is reversed, demurrer sustained, and bill dismissed.

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§ 2. Powers of the Majority.

PEACOCKS *v.* CHAMBERS.

46 Pa. St. 434. 1863.

Strong, J. The plaintiffs and defendants entered into co-partnership on the 8th day of February, 1860, for the purpose of publishing a daily newspaper in the city of Philadelphia. By the articles of co-partnership it was agreed, among other things, that the stock of the firm should be divided into fifty shares, and that each proprietor should be interested in the proprietorship, stock, property, profits, and losses, in the proportion which the share or number of shares held by him bore to the whole number of shares. It was agreed that the association should continue for the full period of five years, from the first day of February, 1860, and that at the expiration of that time, or upon its other sooner dissolution, the stock and property should be sold, divided, or otherwise disposed of. It was also stipulated that an editor should be employed, from time to time, for a term of not more than five years, at any one engagement, and at a salary of not more than $2,000 per annum; and also a publisher for a term of not more than five years, at any one engagement, at a salary of not more than $1,200 per annum, each of whom, during the term of his employment, should be a proprietor.

The complainants are the holders of twenty-seven shares of the stock, and the defendants are the holders of the other twenty-three shares.

The bill avers that on the 8th of February, 1860, James S. Chambers, one of the defendants, was elected publisher of the newspaper, but that neither at the time of his election nor subsequently was any term assigned for the duration of his employment; that he continued to act as publisher until August 16, 1862, but did not devote care, skill, and attention to the business of the department to which he had been assigned; that in the month of April, 1861, he accepted an appointment as navy agent, at Philadelphia, the duties of which office have occupied his time and attention ever since, to the exclusion of the interests of the co-partnership. The bill further charges that at a regular meeting of the association, held on the 16th of August, A.D. 1862, at which all the proprietors were present except Ferdinand L.

Fetherston, one of the complainants (he, however, having been represented by his proxy), a resolution was passed, removing the said J. S. Chambers from being the publisher, and appointing the said Fetherston in his stead, and that the resolution received in its favor the votes of the holders of twenty-seven shares of the stock. The bill further avers that from the time of the adoption of said resolution to the present, the defendants have refused to permit Fetherston to act as publisher of the newspaper in place of the said Chambers, and have hindered and prevented him from entering on the duties of his appointment, in violation of the articles of the association. The complainants therefore pray that the defendants may be enjoined against denying to the said Fetherston the right to publish the said newspaper, and against interfering or intermeddling with him in the exercise of his rights as publisher, and against refusing him access to said paper and all the property of the co-partnership, and against disobeying or interfering in any way with the resolution passed August 16, 1862.

To this bill the defendants have put in separate answers. They agree in substance in denying that Chambers held his appointment at the will of the association, or of the complainants, who are a majority of the partners, and they assert in answer to interrogatories propounded, that the defendant, Chambers, was on the 8th day of February, 1860, selected and chosen publisher of the newspaper, and that it was distinctly understood and agreed, by and between the said Chambers and the said partners, that the term of five years was assigned between themselves, and agreed upon with him for the term of his employment, and that he was not to be discharged from his office or employment during the said term.

We have, then, a case of a partnership in which a majority of the partners, both in number and interest, have determined that the duties of publisher, as defined in their fundamental articles, shall be performed by an agent whom they have chosen. The agent was eligible, for he was a proprietor. So far as it was in their power, the majority have not only imposed upon him those duties, but they have conferred upon him all the rights and privileges which, under the articles of co-partnership, belong to the office of publisher. Such is the effect of the resolution of August 16, 1862, and this was done at a regular meeting of all the partners, at which each was allowed a voice. With this action of the majority the defendants are not only dissatisfied, but they deny the power to pass such a resolution appointing the complainant, Fetherston, the publisher, and one of them refuses to permit him, though thus appointed, to enjoy the rights and enter on the duties of his appointment.

That it was the action of the firm, and obligatory upon all the partners as such, is maintained, both in reason and authority, unless it was in conflict with the fundamental articles. In Collyer on Partnership, 104, the author, after remarking that it had been said by a

learned writer (Chitty's Laws of Commerce, vol. III. p. 224) that, in the absence of an express stipulation, a majority must decide as to the disposal of the partnership property, adds that, "It may perhaps be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary transactions of the partnership." In Story on Partnership, c. 7, § 123, the author says: "But another question may arise, and that is, whether, in case of partnership, the majority is to govern in case of a diversity of opinion between the partners as to the partnership business and the conduct thereof, or whether one partner can, by his dissent, arrest the partnership business, or suspend the ordinary powers and authorities of the other partners in relation thereto against the will of the majority, where there is no stipulation in the partnership articles to control or vary the result (for, if there be any stipulation that ought to govern), the general rule would seem to be that each partner has an equal voice, however unequal the shares of the respective parties may be, and the majority, acting fairly and *bona fide*, have the right and authority to conduct the partnership business within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the minority."

If, then, the rule be that in the management of the interior affairs of a partnership, a majority of the partners must govern, what is there in this case to take it out of the rule? Why is not the resolution adopted on the 16th of August, 1862, at a meeting of all the partners, obligatory upon them all, it having been voted for by a majority in number, and by those who held more than half the number of shares?

The parties agreed that a publisher should be elected for a term not exceeding five years. They fixed a maximum period of service beyond which they could not transgress, but no minimum was defined. The articles left it in their power to employ a publisher for any less term than five years. Duration of service was left to be defined by agreement, outside of the articles, or, if not defined, it was necessarily at will. Of course, if not defined by agreement, any incumbent was removable by the firm. Clearly, therefore, it rests upon the party which denies power to remove to show that the power was fettered by an agreement for a definite period of service not expired when the resolution of August, 1862, was adopted. This is not shown by the pleadings.

And as the pleadings do not show any hiring or employment of Mr. Chambers for a definite term, so the proofs taken utterly fail to establish it.

Decree reversed and the relief prayed for in the bill granted, with costs against the defendants.

§ 2. Effects of Dissent.

CARR et al. v. HERTZ et al.

54 N. J. Eq. 127: 33 At. 194. 1895.

The bill is filed by two partners to annul a series of mortgages made by a third person, as partner, upon all the firm property, to certain of the firm creditors. All these partners were executors or executrixes of deceased persons who had by will left that part of their estate theretofore invested in the business still in the business, with power to their personal representatives to continue the said business. To understand the questions raised, it is essential that the evolution of the partnership which existed at the date of the execution of these mortgages should be exhibited in detail, as well as the transactions which preceded and attended the making of these instruments. In 1883, there was a firm in the city of Newark carrying on the business of tanners and dealers in leather. The firm was composed of Joseph W. Carr, John W. Carr, and Louis M. Smith. Joseph W. Carr died in 1884. By his will he gave to his wife the use of all his estate during her widowhood, with remainder over to her children. The will contained the following provision: "My desire is that the interest which I now have as partner in the leather business conducted in the said city by the firm of Smith & Carr shall remain undisturbed, and that my widow shall, at the expense of my estate, employ some person who shall be acceptable to the surviving members of the said firm to represent her." Martha Carr, the widow, was appointed sole executrix. She, having drawn as much of her husband's interest as was in excess of that of the other partners, left the balance of the estate which had been invested in the business still in the business. The business was thereafter conducted by her and the surviving partners until February 19, 1886. At that time the interest of Louis M. Smith was bought out by John W. Carr and the executrix. Thereafter the business was continued in the firm name of "John W. Carr & Co.," or, as indicated on some of the bill heads, "John W. Carr & M. Carr." John W. Carr was the managing member of the partnership. One Charles Wenzel was in his employ; and upon John W. Carr's absence in California, by reason of his sickness, Wenzel was given a power of attorney to transact the business and sign the firm name. John W. Carr died, leaving a will dated December 5, 1887, in which will he gave his wife a certain portion of his property, and then gave the residue of his estate, real and personal, to his executors and the survivors of them, in trust for the following purposes: "To continue the business of the firm during the lifetime of his wife if it should be found profitable and his executors should deem it best to do so." He authorized his executors to enter into any arrangement or agreement, as they saw fit, to continue and carry on the said

business, with or without the present partner, and to use the residue of the estate as they may see fit, and to manage and conduct the business for his said interest therein, in all respects according to their judgment, until the death of his wife, or until such time in her lifetime as the said executors should see fit to discontinue the same. He empowered his executors to sell, in their discretion, any part of his real estate which was not embarked in the said business, and also the proceeds of such business upon the discontinuance thereof. In this will, the testator's wife, Caroline, and Charles Wenzel, were appointed executors. No arrangement was entered into by the said executors with the partner Martha Carr in respect to the continuation of the business, nor was any agreement or understanding entered into between Caroline A. Carr and Charles Wenzel in respect to the carrying on of the firm business. The business, however, went on as usual. The two ladies were entirely unfamiliar with the practical operation of the business, and the business was continued on the same line and under the same management as it had been conducted prior to John W. Carr's death, with the exception that checks and notes and evidences of indebtedness were required to be signed by Martha W. Carr; and, although the bank seems to have recognized some signatures of the firm name made by Charles Wenzel, the agreement of the co-partners was that the firm name should be signed only by Martha W. Carr. After the probate of the will, Wenzel was urged to have an inventory of the estate of his testator made, which would have necessitated an investigation into the affairs of the partnership. This he, on one excuse or another, postponed from time to time, and it was, in fact, never made. On various occasions and to different persons, he repeatedly remarked that he was not interested in the concern individually. According to Mr. Wenzel's testimony, the firm had met with a loss previous to the death of John W. Carr; and some time in October, 1891, the attention of the two ladies was called to the fact that the estate was in an embarrassed condition. The two executrixes called a meeting of the creditors of the firm on November 23, 1891. At this meeting the authority of the executrix was practically turned over to the creditors. They were empowered to inspect and protect the firm property. The creditors appointed a committee, which committee went to the factory, and were refused admittance by Mr. Wenzel. Subsequently, the committee gained access to the factory, made an inventory and appraisement of the personal property, and put a keeper in charge, and continued the work of tanning. On November 30th, another meeting of creditors was held, at which the executrixes, through their counsel, offered to turn over all the assets of the firm to two trustees for the creditors, and hold the proceeds until all the creditors signed a certain paper which allowed the widows to retain their homes. On the same day, the executrixes executed an assignment of all the firm property to two trustees to carry out this purpose, but said assignment did not

become effective, because some of the creditors refused to accede to the condition. Charles Wenzel refused to take any part in the proposed action of the executrixes, but, beginning on December 1st, he, between that date and December 13th, inclusive, made a series of mortgages, which practically exhausted the entire firm property. He made two mortgages on December 1st to Isaac Hertz, — one upon the hides in process of manufacture, to secure $775.49; the other upon all tools, fixtures, accounts receivable, two horses, carriages, wagons, and harness, to secure the sum of $850.15. On December 2d, he made a mortgage upon all the property covered by the second Hertz mortgage, as well as upon the 628 hides, to the Newark Bark Company, to secure the sum of $2,320. On December 3d, he made three concurrent mortgages upon the hides, accounts receivable, tools, fixtures, all their business assets, — one to Cornelius Fitzpatrick and John Doolan, to secure $1,118.70; another to Charles Smythe, to secure $3,337.63; and still another to secure Levi R. Barnard the sum of $1,277.15. On December 13th he made three real-estate mortgages, covering all the interest of the firm in certain designated property. One of these mortgages was made to Cornelius Fitzpatrick and John Doolan, to secure $1,118.70; another, to Charles Smythe, to secure the sum of $3,337.63; and one to Levi R. Barnard, to secure $1,277.15. These mortgages were concurrent.

James E. Howell, for complainants.

Chandler W. Riker, for defendants.

REED, V. C. As already stated, this bill is filed by Caroline A. Carr, executrix of John W. Carr, and Martha Carr, executrix of Joseph W. Carr, attacking several mortgages made by Charles Wenzel. The authority of Mr. Wenzel to execute those mortgages, if it existed at all, must rest upon an implied authority residing in him as a partner. It is clear he did not become a partner in the business by any conventional arrangement between Caroline A. Carr and himself. His right to rank as a partner resulted entirely as an inference of law, from the fact that he had carried on, with the property of his testator, the business as a firm business. But inasmuch as his co-executor, while having no voice in the active transaction of the business, seems to have acquiesced in its continuance, the law would seem clearly to clothe Wenzel with the authority of a partner in the business. Assuming, therefore, that he possessed the power and authority of a partner, the question supervenes: Did the implied authority with which a partner is invested authorize him to execute, under the circumstances of this case, the series of mortgages now attacked? It is entirely settled that a partner has the implied authority to sell any portion of the firm property. He possesses that power although the sale may be made to pay an antecedent debt, and although the sale itself may lead to the insolvency of the firm. So may he pledge or mortgage a part or all of the firm property for the purpose of raising funds to carry on the partnership business, or to

pay some one or more of the outstanding debts of the firm. All this power is conceded to a partner so long as his acts are *bona fide*. . . .

But it seems to me that the case presents another question, which is whether the power of Wenzel, if it would otherwise have existed, was not in this instance limited by the known dissent of the other partners to his act. It is entirely settled that, while third persons dealing with the firm will not be affected by any limitation upon the authority of partners contained in the articles of co-partnership, yet, if a person dealing with one partner has notice of this limitation, he cannot hold the firm if the partner's act is violative of the limitation. 1 Lindl. Partn. 170. And knowledge of restrictions upon the power of a partner may be established by circumstantial evidence as well as by direct proof of notice. 17 Am. & Eng. Enc. Law, 996. It is especially well settled that in respect to those implied powers with which a partner is invested, if a party dealing with such partner receives notice of the dissent of his co-partners from any act of such partner, the third party cannot hold the firm by reason of such act. The apparent implied authority is revoked by dissent coupled with the notice of dissent. Id. 997; Gallway *v.* Mathew, 10 East, 264; Willis *v.* Dyson, 1 Starkie, 164; Monroe *v.* Conner, 15 Me. 178; Matthews *v.* Dare, 20 Md. 248; Knox *v.* Buffington, 50 Iowa, 320; Wilcox *v.* Jackson, 7 Colo. 521.

In most cases where the occasion for the application of this rule has arisen, either a direct notice of the dissent was given to the person dealing with the partner, or a general notice of which he has knowledge. The question, however, is not in respect to the form of the notice, but whether there was notice, and circumstances may speak as forcibly as words. Wilcox *v.* Jackson, *supra.* Now, in view of these well-settled rules, how do these mortgages stand? It is in evidence that the two executrixes, on November 23, 1891, called a meeting of the firm creditors, at which meeting their intention was manifested to devote the property to the payment of all the firm creditors. This purpose still more clearly appeared by the transactions which occurred at and which followed the meeting of November 30th. At this meeting it was proposed to turn the property over to trustees, who were to take charge and sell the same, and pay the creditors *pro rata.* There was, indeed, a condition annexed that the homes of the executrixes should be left intact; but that the intention, and sole intention, of these executrixes, was an equal distribution of the firm property among the creditors, is unmistakable. Now, at this meeting of creditors all the mortgagees were present. They all knew that, so far as the two executrixes were concerned, they intended this disposition of the property, and that they intended no other. Wenzel himself, of course, knew the intention of the executrixes. He knew that they had refused to make mortgages to other firm creditors. He himself asserts that, inasmuch as they chose to adopt their method, he concluded that he would adopt his. He knew that

the trustees representing the creditors were in possession of the factory, and I have no doubt that the mortgagees knew the same. Now, on the heels of the meeting of November 30th and the action of the trustees taking possession of the factory, these mortgagees hastened to Wenzel, and, on the 1st, 2d, and 3d of December, induced him to make the chattel mortgages. They knew — no reasonable person could have failed to know — that the two executrixes were opposed to any action upon Wenzel's part, and certainly of his execution of any mortgages. Now, if it be true that these mortgagees, as well as Wenzel, had notice of the antagonism of the two executrixes to the execution of any mortgage to any of the creditors, the rule applies that the implied power which he may have had to dispose of the property by way of mortgage was revoked by the circumstances just mentioned.

Again, it seems to me that there is another feature in this case which leads to the same result. It will be recalled that Mr. Wenzel was one of the two personal representatives of a deceased partner. These two represented a single interest in the firm, the other interest being represented by Caroline A. Carr, the other executrix. Now, while one of two executors or administrators has the power to sell, in the course of administration, any of the property belonging to the estate, yet the property that these personal representatives held at the time of these mortgages was trust property. The will of John W. Carr impressed all the property that had been invested in this business with an express trust. It seems entirely clear that, in executing the discretionary power with which they were invested by the will in dealing with this property, they could only act jointly. Thus, the power to continue the property in the partnership business, if they should deem best to do so; the power to enter into some arrangement to carry on the business either with or without Caroline, the surviving partner; the power to sell the real estate upon the discontinuance of the business, — all these powers were confided to joint trustees, and required joint execution. So far as respected the conduct of the business, Mr. Wenzel was probably, by virtue of his legal character as partner, — certainly by the authority which was conferred upon him by the permission of the other partners, — entitled to buy and sell and conduct all the current business of the partnership as any other partner; but when he attempted to dispose of all the property of the firm, and therefore all of his trust property, not as an act done in transacting the current business of the partnership, but after admitted insolvency, as a final disposition of all the property, it seems to me that the trust restriction upon his separate power comes into play. Now, that he was no partner, save by virtue of his position as executor, was well known to all the creditors of the firm. They knew that, on the winding up of the business, anything that might remain belonged to the two trust estates; that this trust estate was represented by two trustees; and yet, by the act of one

against the dissent of another, they accepted these mortgages, which admittedly extinguished the trust property entirely. For the reasons stated, I think that the whole series of mortgages should be declared void.

In respect to the real-estate mortgages, they seem to be inefficacious to bind the firm property upon another ground. As a general rule, one partner, without the assent of his co-partners, cannot bind them by any act which requires a seal. Ellis *v.* Ellis, 47 N. J. Law, 70. And as a mortgage requires a seal, or what in this State stands for a seal, its execution by one partner is within this restriction. For this reason, and because each partner is a tenant in common, the general rule seems to be that real estate belonging to a firm, not engaged in the sale of real estate, cannot be conveyed or incumbered by a mortgage made by one partner, unless such power is expressly conferred upon him or the title is vested in him. 1 Lindl. Partn. 137; T. Pars. Partn. 337; Chief Justice Shaw, in Tapley *v.* Butterfield, 1 Metc. (Mass.) 518.

There should be a decree for the complainants.[1]

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§ 2. Notice of Limitations on a Partner's Power.

INTERNATIONAL TRUST CO. *v.* WILSON.

161 Mass. 80: 36 N. E. 589. 1894.

Action on three promissory notes dated April 3, April 30, and July 16, 1891, signed "Wilson, Cassells, & Company," — the first two to the order of defendant and indorsed in defendant's name, the third to the order of plaintiff; and for money had and received at the respective dates of the notes. At the time plaintiff discounted the notes, defendant was a member of the firm of Wilson, Cassells, & Co. The notes were executed by Cassells in the firm name, and defendant's name was indorsed on the first two notes by Cassells without Wilson's authority. Plaintiff claimed to recover the amount advanced to Cassells on these notes as money loaned to the firm. Upon evidence that the money was used by Cassells for his own benefit, and not for the firm, that there was an agreement between him and Cassells that no money should be borrowed for the firm except upon notes payable to Wilson's order and indorsed by him, and that he had indorsed fifteen such notes which had been discounted by plaintiff, defendant asked the court to charge, among other things, that the form of the notes in suit, as well as of those previously used in all transactions with the plaintiff, was notice to it that the loans were not made to the partnership, but to Wilson individually, and that plaintiff must establish that Cassells had authority

[1] Decree affirmed unanimously by the Court of Errors, for the reasons given in the Court of Chancery. 54 N. J. Eq. 700.

from defendant in his individual capacity to act as his agent, and such authority could not be implied from the fact that they were partners. The trial judge declined, and instructed the jury: "I am unable to rule that the notes themselves show that this money which Cassells obtained on the discount of these notes was for Wilson individually. I do not mean to say there may not possibly be some evidence of it, — I mean I cannot rule that the form of the notes themselves indicate that." Verdict for the plaintiff on the third note, and for the amounts of the other two as money had and received by the firm. The defendant alleged exceptions.

R. M. Morse, for plaintiff.

S. L. Whipple, for defendant.

BARKER, J. . . . 2. If, as the defendant contends, the court had de clined to permit the jury to consider the form of the notes upon the question whether the plaintiff should be charged with notice that there was an agreement between Cassells and the defendant limiting Cassells' authority to borrow money for the firm to loans on notes payable to and indorsed by the defendant, such a ruling would have been wrong. But, as we construe the bill of exceptions, the jury were permitted to consider the form of the notes in connection with all the evidence, but were, in effect, also instructed that the form of the notes was not, as matter of law, conclusive upon the question. The defendant requested the court to instruct the jury that the form of the notes "was notice to the plaintiff," and that it "gave notice to the plaintiff." This would have been in substance a ruling that the form of the notes was, as matter of law, conclusive in favor of the defendant upon the question, and would have been contrary to the authorities. The true rule was that the jury might consider the form of the notes in connection with all the other evidence in determining the question whether they should in fact charge the plaintiff with notice of a limitation of the authority of Cassells to borrow money for his firm. Atlas Nat. Bank *v.* Savery, 127 Mass. 75, 77; Freeman's Nat. Bank *v.* Savery, Id. 78; Thompson *v.* Hale, 6 Pick. 259; Wait *v.* Thayer, 118 Mass. 473, 478. In Bank *v.* Law, 127 Mass. 72, the defendants' indorsement being above that of the payee made it apparent in the light of St. 1874, c. 404, that their liability was conditional and secondary, and therefore *prima facie*, at least, for the accommodation of the maker. In that case the inference was made necessary by the effect of the statute, but the decision has no bearing in support of the defendant's contention that the inference of notice of a limitation upon the authority of one partner to borrow money for the use of his firm should have been held a necessary inference from the form of the note in the case at bar. It is obvious that the same form might have been used if Cassells' authority had been unlimited. The case of Cutting *v.* Daigneau, 151 Mass. 297, cited upon this point by the defendant, has no bearing upon it. The note was one given to a partner by his firm, which became insolvent and was dissolved, and the note, when long past due, was indorsed to the

plaintiff merely that the action might not be defeated by the formal objection that the payee, being one of the promisors, could not bring an action against himself; and the action failed because the firm having failed, and its creditors not having been paid, there was no surplus to divide among its members, and the plaintiff stood no better than the original payee. Nor, in our opinion, did the ruling given withdraw the form of the notes from the consideration of the jury. The notes were in evidence, and the instruction could not have been understood to withdraw them from the jury, but merely to declare that they did not show or indicate notice conclusively or as matter of law.

3. The only remaining contention argued by the defendant is that the court finally withdrew from the jury the question whether the plaintiff should be charged with actual or constructive notice of Cassells' fraud. The jury had found that, in fact, the plaintiff had no knowledge or notice of the limitation of Cassells' authority, nor that he was then acting as an agent of the defendant, and not as a member of the firm. The remaining evidence applicable to the question was not sufficient to warrant a finding that the plaintiff did not take the notes and advance the money to the firm in good faith. There was no dispute that the plaintiff took the notes before maturity, and for value. The evidence that Mr. Graham, its president, had noticed unusual facts about the bank account, indicating that the firm was not doing a flourishing business; that he had seen Cassells the worse for liquor, and had thought of writing the defendant about him; that he had notified Cassells on account of these things that he would not discount for him to the extent he had been doing; that he knew that the defendant was in business at Fitchburg and paying little attention to the business in Boston, and so practically at Cassells' mercy if Cassells was disposed to defraud him, — were merely suspicious circumstances, consistent with the plaintiff's good faith, and not sufficient to justify charging it with notice of any infirmity or taint in the transaction. There was no evidence of such recklessness as would be inconsistent with honesty of purpose or good faith. Smith *v.* Livingston, 111 Mass. 342; Freeman's Nat. Bank *v.* Savery, 127 Mass. 75, 79; Lee *v.* Whitney, 149 Mass. 447.

Exceptions overruled.[1]

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§ 3. Powers of a Partner after Dissolution.

BUTCHART *v.* DRESSER.

4 De G., M. & G. 542. 1853.

This was an appeal from a decree of Vice-Chancellor Wood. The facts of the case are stated in 10 Hare, 453. The following is an outline of them.

[1] The statement of facts is shortened, and a part of the opinion dealing with a question of practice is omitted.

Messrs. Butchart & Tempest carried on business in partnership, as share-brokers, till October 11, 1844, when the partnership was dissolved. Before the dissolution Mr. Tempest had entered into contracts for purchases of shares on behalf of the firm. After the dissolution, Tempest borrowed money of the bankers of the late firm to enable him to complete the purchases, and at the same time deposited the shares as a security, with a memorandum in the name of the firm, authorizing the bankers to sell the shares. A sale having been made by the bankers accordingly, Mr. Butchart instituted this suit against them, seeking to make them liable for the value of the shares, as at the highest price at which they might have been sold since the deposit, on the ground that the sale was unauthorized.

The VICE-CHANCELLOR held that the sale was binding on the plaintiff, who now appealed from that decision.

Mr. Bailey and *Mr. Bagshawe*, in support of the appeal.

Mr. Bacon and *Mr. Osborne*, for the respondents, were not called upon.

THE LORD JUSTICE TURNER. This is a bill by one of two partners in a dissolved partnership seeking to charge the Yorkshire Banking Company with the value of a number of shares which the dissolved partnership had agreed to purchase before the dissolution, and two points only arise in the case: first, whether the deposit made by Mr. Tempest after the dissolution was or was not valid; secondly, assuming the deposit to have been within his authority, whether a sale by the bank was or not binding on the partnership.

Now that a partner has, during the partnership, power to pledge the partnership assets for partnership purposes, cannot be denied. That he has power to sell during the partnership, for partnership purposes, is equally clear. The question, therefore, is reduced to this, whether the power to pledge or sell is or is not gone upon the dissolution. The general law is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership, for partnership purposes, as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution, it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item of the account. Nor is there any inconvenience in this state of the law; for it is competent to any partner to apply, in case of necessity, for a receiver, and to have the affairs of the partnership wound up under the direction of this court, and thus to prevent his partner from exercising unduly any power which he has as a partner.

It is, however, contended that in this case the plaintiff had given notice to the bankers not to pay any check drawn on account of the partnership. But it is not disputed that contracts had been entered

into before the dissolution, and the question is how those contracts were to be fulfilled, — it being the duty of each party to fulfil them. One partner considered it expedient that the purchases should not be completed, but that the shares should be thrown back on the hands of the vendors. The other partner considered it right to sell the shares, and settle the contract by completion and realization. Neither partner applied to this court in the matter. What was the necessary consequence? Was it not that the original contracts entered into before the dissolution ought to be completed, and the matter treated as remaining in the state in which it was at the time of the dissolution? It seems to me to be clear that in these circumstances of a difference of opinion between the partners, as to retaining or giving back the purchased property, and of neither of them applying to this court, the proper course was to perform the contracts. The question arises whether Mr. Tempest had authority to raise money for the purpose of completing the purchases. If the partnership had continued there could have been no doubt on the subject, and I think that there is no doubt that it subsisted after the dissolution for the purposes of the contracts entered into during its continuance. The true solution of the question is, that if the plaintiff had reason to complain of the acts of his partner, his proper course was to apply to this court for a receiver.

The appeal must be dismissed with costs.

The Lord Justice Knight Bruce concurred.[1]

[1] In Frazer *v.* Kershaw, 2 K. & J. 496 (1856), after the dissolution of a firm by the bankruptcy of one partner, a separate creditor of the other partner obtained judgment, and the sheriff sold to defendant the judgment debtor partner's share in the firm assets. Later, the judgment debtor was adjudged a bankrupt, and plaintiff, having been appointed assignee of the joint estate and effects, obtained an injunction restraining defendant from selling or intermeddling with the firm goods as her sole property, pending an action for an accounting. Vice-Chancellor Wood said (p. 501), Fox *v.* Hanbury, Cowp. 445 (1776), "Decided, that if one of two partners becomes bankrupt, the solvent partner, in winding up the affairs of the partnership, has a right to sell the partnership property to pay the partnership debt. But it does not follow that this right can be transferred to another. The solvent partner would not be able to assign over to another, as part of 'all his right and interest,' the power of sale so vested in him for the payment of debts. That power is a personal authority, personal to himself in his capacity of partner, and which he may exercise in that capacity. Still less can it be inferred from Fox *v.* Hanbury, that a solvent partner, by exposing himself, although perfectly *bona fide*, to a judgment, and allowing his share to be taken in execution, can pass to the sheriff any such power of selling the partnership property for the purpose of winding up the partnership affairs. The sheriff can have no such power any more than a stranger has such power. It is a power confined to the partner himself, which, when exercised *bona fide*, the courts have maintained, to enable him to proceed in winding up the partnership affairs in due course."

RICHARDSON *v.* MOIES ET AL.

31 Mo. 430. 1862.

Ewing, J. Moies & Woodward, during their partnership, and under the firm name of Moies & Co., executed certain promissory notes to the plaintiff for an indebtedness subsisting prior to the dissolution of the partnership, which took place in January, 1858. The notes in suit were dated in March, 1858, and executed by Moies in the firm name. It was proved by the plaintiff that there was an agreement between him and Moies & Woodward, when the first notes were given in December, 1857, to the effect that, as the firm would not be able to pay the same at maturity, they, upon paying $500 at that time, might give new notes for the balance, allowing further time. There was also evidence tending to show that Moies in some cases had given notes in the firm name, after dissolution, with Woodward's assent; also, that he (Woodward) denied the right of Moies to do so without his authority. It is not claimed that there was any authority or assent as it respects the notes in question, other than that by the agreement mentioned. Nor is it maintained that one partner, after the dissolution of the partnership, can make a note in the name of the firm, or in renewal of a note of the firm, so as to bind the other members, without special authority. The evidence introduced by the plaintiff, as to the agreement, was objected to, and exceptions taken to its admission.

It would seem that the notes sued on were given at the maturity of the first, pursuant to the agreement had in December previous. Moies, under this agreement, had authority to execute the notes in the name of the firm, unless it was revoked by the fact of the dissolution of the partnership. Admitting that there may have been no consideration for the promise of the plaintiff to give time on the balance of the debt, and that the agreement would not have availed the defendants had Richardson, disregarding it, sued on the first notes. Yet the notes in controversy were given for a debt contracted by the firm, in respect to which the liability of the firm remained the same, of course, after as before the dissolution. And as the authority was conferred for the purpose of renewing a pre-existing obligation, the consideration for which is not questioned, the termination of the partnership did not revoke it, if it were originally sufficient for the purpose intended.

Judgment affirmed.

POTTER *v.* TOLBERT.

71 N. W. (Mich.) 849. 1897.

MOORE, J. This suit was commenced the latter part of 1895 to recover a balance claimed to be due upon a note dated January 8, 1887, signed by "Leroy Moore and Company," upon the back of which was an indorsement of "five hundred dollars paid January 9, 1892." Defendant, Tolbert, filed with his plea a denial under oath of his execution of the note. The case was tried by a jury, who rendered a verdict for the full amount claimed by the plaintiff. Defendant appeals, and claims that under the proofs a verdict should have been directed in his favor.

The plaintiff's testimony tends to show that for some years prior to 1884 defendant, Tolbert, was a member of the firm of Leroy Moore & Co., who were engaged in the banking business at Greenville, Mich. The plaintiff was a depositor in the bank, which suspended payment and closed its doors in June, 1884. The plaintiff was one of a committee of creditors and depositors. The committee met with Moore and Tolbert at or about the time of the suspension, and were told by Tolbert that he was a full partner in the business; that at this meeting there was a proposition made by the committee to call the creditors together, and recommend that they should take 60 cents on the dollar, and that Mr. Moore and Mr. Tolbert refused, saying they had always paid 100 cents on the dollar, and that all they wanted was time to liquidate; that after this time plaintiff was paid interest on the face of the account up to the date upon which the note was given. The plaintiff further testified that Mr. Moore had the active management of the bank during the time Moore & Co. were in business, and had the active management of liquidating their affairs; that there was due him on his deposit January 8, 1887, the amount stated in the note which he took on that date. He says he had no knowledge after the suspension of the bank and prior to the taking of the note that Moore & Co. had dissolved partnership, that the note was signed and delivered to him by Leroy Moore, and there was paid to plaintiff by Leroy Moore $500, January 9, 1892, and that at that time he had no notice of the dissolution of the firm. On the cross-examination he testified that he knew the firm Leroy Moore & Co. from the time they started business in Greenville until they suspended payment, and at times was a borrower of them; at the time of the suspension he was a creditor; that they carried on no business in Greenville but the banking business; that plaintiff was a lumberman, and handled a good many thousands of dollars each year through the bank of Leroy Moore & Co.; that their business was carried on at the corner of Cass and Lafayette streets in Greenville; that they closed their doors permanently in June or July, 1884, and has no recollection of their opening again, or of their doing business,

after that. He further testified that this banking firm was succeeded by the City National Bank of Greenville in the summer of 1884, which bank occupied the place of business formerly occupied by Leroy Moore & Co. Plaintiff kept an account and made his collections through the City National Bank, of which Moore was first cashier, and then president; that after Moore became president he had active charge of the affairs of the City National Bank, and spent practically all of his time with it, and that the City National Bank continued to do business in the same rooms formerly occupied by Leroy Moore & Co. until 1893, when it suspended. He further testified that prior to 1884 Leroy Moore & Co. had a sign on their banking place during the entire time they were in business, reading "Leroy Moore & Co." When the City National Bank occupied the rooms the sign "City National Bank" was put up, and the sign "Leroy Moore & Co." disappeared; and that the note in suit was the only note he ever had for his deposit. He further testified it was well known that Leroy Moore & Co., after the suspension, were not doing any business in Greenville except liquidating their old indebtedness, which was attended to by Leroy Moore. He further testified on the direct examination that when the committee met with Moore and Tolbert in June, 1884, it was arranged that Mr. Moore would continue in charge of the business of the firm collecting the accounts and liquidating the debts. No time was specified or agreed upon within which this was to be done, but the understanding was they were to pay the debts in full. It does not appear from the testimony of the plaintiff that he ever talked with Mr. Tolbert after this meeting in June or July, 1884. Mr. Tolbert denied the material statements contained in the plaintiff's testimony. He denied that after the bank suspended he ever authorized Moore to give notes of the firm for any indebtedness, either old or new, and that he had no knowledge of the giving of the note in controversy, or of the payment of $500 made upon it, until shortly before the suit was brought.

Giving the testimony of the plaintiff the most favorable construction possible, the questions involved are: First. Did the suspension of the bank dissolve the partnership? Second. After the dissolution of the partnership, was Leroy Moore authorized to give the note of the firm for the debt of the firm which existed at the time of the suspension? The evidence is too plain for controversy that the firm of Leroy Moore & Co. ceased to do a banking business in Greenville in June or July, 1884, and that plaintiff knew of it. The law is pretty well settled that a partnership is dissolved when it ceases to do the business for which it was organized. 3 Kent, Comm. (13th ed.) 62; Pars. Partn. (3d ed.) 416; Spurck *v.* Leonard, 9 Ill. App. 174; Bank *v.* Page, 98 Ill. 109; Ligare *v.* Peacock, 109 Ill. 94.

As to the second question. It has long been settled in this State that the partner who is intrusted with the settlement of partnership affairs is not authorized, after the dissolution of the partnership,

to give notes in settlement of partnership debts, in the absence of authority conferred upon him by the other partners to do so. The liabilities of the partners might be greatly increased, and their rights greatly impaired, if the partner who is settling the partnership affairs may make partnership paper, which is payable a long time in the future, without being authorized to do so. It was assumed in Bank *v.* Kercheval, 2 Mich. 506, that the law was well settled that no such implied authority existed. In Smith *v.* Shelden, 35 Mich. 42, it was said: "We think it much safer to require express authority, when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all." Atwood *v.* Gillett, 2 Doug. (Mich.) 206; Pennoyer *v.* David, 8 Mich. 407; Matteson *v.* Nathanson, 38 Mich. 377; Jenness *v.* Carleton, 40 Mich. *343; Carleton *v.* Jenness, 42 Mich. 110; Goodspeed *v.* Plow Co., 45 Mich. 237; Johnson *v.* Emerick, 70 Mich. 215. The record discloses an entire absence of authority conferred by Mr. Tolbert upon Mr. Moore to sign notes for the firm after the dissolution of the partnership. There is also no proof of authority to make the $500 payment which had the effect of taking the note out from the running of the statute of limitations. As the case stood when the proofs were closed, the jury should have been instructed to return a verdict for the defendant, Tolbert.

Judgment is reversed, and a new trial ordered.

WOOD ET AL. *v.* BRADDICK.

1 Taunt. 104. 1808.

THIS was an action brought to recover from the defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in America, as the plaintiffs alleged, to the defendant jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only. The defendant pleaded the general issue, and the statute of limitations. At the trial at Guildhall, before MANSFIELD, C. J., the plaintiffs produced in evidence a letter from Cox, dated the 24th of June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment.

It was in proof that on the 30th of July, 1802, Braddick and Cox dissolved their partnership, as from the 17th of November, 1800.

Cockell and *Lens*, *Serjts.*, objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge Braddick. The CHIEF JUSTICE overruled the objection, but reserved the point: and the jury being of opinion that the agency was undertaken by Cox on the partnership account, found a verdict for the plaintiff.

Cockell, *Serjt.* now moved for a new trial.

MANSFIELD, C. J. Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partnership remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved his account of their joint contracts should cease to be evidence? — and that those who are to-day as one person in interest should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?

HEATH, J. Is it not a very clear proposition, that when a partnership is dissolved it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue.

Cockell took nothing by his motion.

HART *v.* WOODRUFF ET AL.

24 Hun (N. Y.), 510. 1881.

DYKMAN, J. The defendants constituted the firm of Woodruff & Robinson, which dissolved on March 1, 1875. At the time, the firm was indebted to the plaintiff for money, and the claims rested in account on the defendants' books. By the articles of dissolution the business of the firm was to be liquidated at the store of the firm, and all the partners were to assist in such liquidation and were authorized to sign in liquidation. On August 27, 1875, by direction of Robinson, one of the defendants, and one of the members of the old firm, the account was made out and sent to plaintiff. (This account showed that the defendants were indebted to plaintiff in the sum of $1,441.37.)

The plaintiff and one Youngs had a large balance of money with Woodruff & Robinson at one time, which was divided on their books, part going to the credit of Youngs and part to the credit of the plaintiff, and forming the basis of this account rendered. This action was commenced in the summer of 1880 on the account as a stated account. The defendant Woodruff had no knowledge of the account, and did not authorize it. He alone defended. The only proof offered on the part of the plaintiff was this agreement of dissolution and the account rendered; and the court directed a verdict for the plaintiff, and afterwards refused to set it aside.

The question then presented is, whether Robinson had power to bind Woodruff by stating an account from which the law implies an agreement to pay the amount shown to be due. During the continu-

ance of a co-partnership each member of the firm, within the scope of the partnership, is deemed the authorized agent of all his associates; but this presumed agency ceases, for most purposes, with the termination of the partnership, and only continues for such purposes as are necessary in winding up the business of the association. After dissolution, there is no power to make new promises, or contracts, or admissions in the name of the firm, even though they do not increase the prior obligation of the partners. The only power thereafter remaining to act for the firm is to sell and dispose of the property, collect, adjust, and pay debts, and give discharges and acquittances. Particularly, is it well settled that the dissolution of a firm annuls the power of the respective partners to contract new debts or create new obligations against the co-partnership.

In Hackley *v.* Patrick, 3 Johns. 538 (1808), the notice of dissolution contained a statement that the unsettled business of the firm would be adjusted by Hastie, and he stated and acknowledged a balance of account due from the firm to the plaintiff, and yet it was held that such admission did not bind his co-partner; and the court said: "This is a clear case; after dissolution of co-partnership the power of one partner to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his co-partners any more than his giving a promissory note in the name of the firm, or any other act. The plaintiff ought to have produced other evidence of the debt; the acknowledgment of Hastie alone was not sufficient to charge Patrick." In Sanford *v.* Mickles, 4 Johns. 224, it was decided that one partner, after dissolution, cannot indorse notes or bills given before to the firm, though he is authorized to settle the co-partnership concerns. In Walden *v.* Sherburne, 15 Johns. 409, Patrick *v.* Hackley was approved, even against a contrary decision of the Court of Common Pleas in England; and it was then held that an admission by one partner, after dissolution, of a balance due from the firm, does not bind the co-partners. In Baker *v.* Stackpole, 9 Cow. 420, the Court of Errors decided unanimously that the admission of one partner, either of an account or any fact made after the dissolution of the partnership, is not admissible as evidence to affect any other member of the firm, and in the only opinion delivered, it is said: "A distinction was attempted upon the argument between the admission of an account and the admission of a fact; but I can perceive none in principle." All of these cases received the approbation of the Court of Appeals in the celebrated case of Van Keuren *v.* Parmelee, 2 N. Y. 523, and it was then said: "Each partner, when acting within the scope of the partnership, is deemed to be the authorized agent of all his fellows. . . . Now how long does this presumed agency continue? Clearly no longer than the necessity for it exists; and for most purposes the necessity ceases with the existence of the partnership. When that is dissolved, there is no longer any ground for presuming an agency,

except as to such things as are indispensable in winding up the concerns of the company. If there be no agreement to the contrary, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, adjust, and pay debts, and give proper acquittances. But there is no ground whatever for presuming a power to make new promises or engagements in the name of the firm, even though they only change without increasing the prior obligations of the partners." These words are sufficiently applicable to this case to have been written with direct reference thereto.

The foregoing examination shows that neither on principle nor authority was the party who stated this account authorized to involve Woodruff thereby. But it is claimed for the plaintiff that a new authority was communciated to each partner by the provision in the articles of dissolution, that all the partners were to assist and sign in liquidation. This provision, however, bestowed no new or additional authority or power. The use and repetition of the word liquidate in these articles has no especial significance. The plain intention of the paper was to confer authority on each partner to wind up and settle up the old business. Precisely that they all had without this provision. There must be some one to adjust the affairs of the concern, by collecting its debts, and disposing of its property, and dividing the proceeds among the parties entitled; and where, as in this case, none of the parties are especially empowered for this purpose, to the exclusion of the others, the individual partners retain the same authority which they possessed before the dissolution, so far as it may be necessary for such purpose. Robbins *v.* Fuller, 24 N. Y. 572. To the same effect is the opinion in Gates *v.* Beecher, 60 N. Y. 525. Our conclusion, therefore, is, that the statement of the account was an admission obligatory only on the partner making the same, and not on the defendant Woodruff; and that the admission of the same in evidence against him was error, for which the judgment must be reversed.

GATES *v.* BEECHER.

60 N. Y. 518. 1875.

ACTION by the indorsee against the indorser of a note made by the firm of Bassett, Beecher, & Co. The note was presented for payment by a notary at the last place of business of the firm, and upon the same day was presented personally to Bassett, one of the partners, and demand of payment made, which was refused. The note was thereupon protested, and notice thereof was duly mailed to defendant.

Judgment for plaintiff. Defendant appealed.

F. W. Hubbard, for the appellant.

A. M. Beardsley, for the respondent.

Folger, J. . . . No place of payment was named in the note. In such case, demand of payment at the usual place of business of the maker, though he be absent, is sufficient; or at his residence; or to him in person. Haltz *v.* Boppe, 37 N. Y. 634. And when such a note is made by a partnership, a demand of one of the partners in person, or a demand at the usual place of business of the partnership, is sufficient. Story on Prom. Notes, § 239. The makers of the note in suit were partners, and it was made by them as such, in their partnership name; demand of payment was made on the proper day, of one of them in person, after the notary had on the same day gone to the last usual place of business of the partnership, for the purpose of making demand there, and found no one of the firm. The name of the firm was Bassett, Beecher, & Co.; and on the question being asked Bassett, when a witness: "When did Bassett, Beecher, & Co. stop business?" he replied: "They were thrown into bankruptcy in June, 1871." I think that we may infer from this that by proceedings in the Bankrupt Court the partnership was declared bankrupt, and its effects and affairs taken charge of by the officers of the law. The partners had separated, though there was no formal dissolution of their partnership by them. But bankruptcy of one member, or of all the members of a firm, works a dissolution of the co-partnership. Story on Partn. § 313. On this state of facts and the law, it is contended by the learned counsel for the appellant, that the demand for payment of the note should have been made of each of the former partners. He cites no authority for his position. I have been unable to find any. If, by the dissolution of the partnership by bankruptcy, and the separation of the partners, they must thereafter be treated as joint makers who are not partners, I think that the force of the authorities is, that to charge an indorser of their note, a demand must be made of each of them, save where the other circumstances are such as to excuse a demand. For to charge the indorser of the note of joint makers, not partners, demand must be made on each. It was so held in Union Bank *v.* Willis, 8 Met. 504. In Willes *v.* Green, 5 Hill, 232, Nelson, C. J., said it was so settled.

It is seen, therefore, that there is a marked distinction taken between the case of a note of joint makers who are not partners, and a note of partners who are still partners at the maturity of the note. That distinction rests upon the fact that partners are but one person, in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that as incident to such joint relations, all of the partners are affected by the knowledge of one. These things do not pertain to the relation of joint makers who are not partners. Hence, while a demand of one partner is equivalent to a demand of all, a demand of one of joint makers not partners is not. And so a demand of one partner is sufficient because he represents the firm, and a

dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others: while in the case of a note of joint makers not partners, the indorser has a right to rely upon the responsibility of all and each, and may insist upon a dishonor by each. Story on Prom. Notes, § 255. So that the inquiry seems to be, whether a dissolution of a partnership, effected by bankruptcy, has so far changed the relations of the members of it, as that the act or knowledge of one does not affect all the rest.

Undoubtedly, a dissolution of a partnership, however brought about, puts an end to certain of the joint powers and authority of all the partners. Perhaps it may be said that no one of the partners can do any act inconsistent with the primary duty of winding up the whole concerns of the co-partnership. This is emphatically the case when the dissolution has been wrought by the bankruptcy of the firm, for then the effects thereof have passed into the control of the court, and all payments therefrom, or chargeable thereon, are to be in the direction of the court, or according to its rules and practice. The principle on which a partner, during the existence of a partnership, may by his act bind his co-partners, is that which governs the relation of principal and agent. The power of an agent to bind his principal ceases when the agency is ended; so that even payment by a former agent of a valid debt against his former principal gives him no right against the latter. The principle has not, however, been carried so far in the case of a co-partner. His relations with the other members of the firm have not been entirely severed. He may, from his own means, pay a valid subsisting debt of the co-partnership, and have the right to claim an allowance thereof on the settlement of the affairs, or contribution from the others. Major *v.* Hawkes, 12 Ill. 298. And a general statement has been made by a text-writer of repute, that every act of administration which is necessary for winding up the concern may be effectually done by one partner, and the rest be bound. 2 Bell, Comm. Bk. 7, c. 2, p. 643, 5th ed. And the author expressly includes in this a case of dissolution by bankruptcy, though it is apparent that the property of a bankrupt concern may not be meddled with by one of its former members. But it is clear that the relations of the individual members of the firm are not, by a dissolution thereof, so completely severed as that no act of one can have any effect upon the others. Robbins *v.* Fuller, 24 N. Y. 570. Each and all have still an interest in the settlement of the affairs of the firm, in the payment of its debts, and the adjustment of the liability of each to it and to each other, and in the just division of any surplus. Though the co-partnership be insolvent, as in this case, and it be declared bankrupt, the members individually may be solvent, and liable to be affected by the final result of the bankruptcy proceedings. And so there does, after a dissolution, still continue that common interest in past transactions, and in the present and future legitimate consequences therefrom, as that a joint power

and authority in relation thereto continues: and while, after dissolution, no member of the late firm can by his act create a new liability against his former co-partners, or bind them to an alleged liability, Hackley *v.* Patrick, 3 J. R. 536, or revive an extinct one, Van Keuren *v.* Parmelee, 2 N. Y. 523, he may do some acts which shall affect and be binding upon them, when such acts are confined to matters in which they all still have a common interest and are under a common liability. Thus, it has been held that one who was once a member of a dissolved partnership which, in his lifetime, had indorsed a note in the firm name, might, after dissolution, waive demand of payment and notice of non-payment, Darling *v.* Maret, 22 Me. 184, which decision was put upon the principle that, though dissolution revoked all power to make a new contract, it did not revoke the authority to arrange those before created and yet subsisting. And it being so, that the act of one of former partners, in relation to a valid subsisting liability of the late firm, does affect the others, and is taken as their act, and his knowledge thereof as their knowledge, there seems no reason why the refusal of one to pay, on demand, a note of the partnership, should not be deemed to be the refusal of all, and all be chargeable therewith. And then, a demand of payment made to one is a demand of payment made to all, and is sufficient upon which to give notice of non-payment to their indorser.

And further, in aid of this idea, it is to be remembered that the contract of the indorser of the promissory note of a co-partnership is that he will pay if the co-partnership does not, while that of the indorser of the note of joint makers is, that he will pay if neither of them does. One joint maker, not a partner of the other, may not be able to speak for the other as to his ability or disposition to protect his promise and to save his indorser from liability, while one partner, though the firm has been dissolved, is supposed to know and care as much as the other of its ability and willingness in these respects. Again, the purpose of demand and notice to the indorser is that he, being informed of the failure to pay by the co-partnership, may be put at once on his guard, to save himself, if may be, from loss. This end is achieved when one of former partners has refused to pay, as when all have.

Taking all the reasons for the distinction made by the law, between the case of a note of joint makers who are partners, and of that of joint makers who are not partners, and all the reasons for requiring a demand of payment of the maker, and notice thereof, and of refusal to the indorser, in order to charge him, we are of the opinion that the rule that a demand of one co-partner is sufficient, applies as well when the partnership has been dissolved, as when it has not. It follows that the demand of payment in this case was sufficient. We find that this view is sustained in brief opinions in Barry *v.* Crowley, 4 Gill, 194; Brown *v.* Turner, 15 Al. 832. . . .

Judgment affirmed.[1]

[1] Portions of the opinion, not bearing upon the law of partnership, have been omitted.

CHAPTER V.

RIGHTS AND REMEDIES OF CREDITORS.

§ 1. Firm Creditors at Law.

HAMSMITH *v.* ESPY et al.

13 Ia. 439. 1862.

Hamsmith commenced his action against "Thomas S. Espy, Charles Baker, and John Robinson, doing business as partners, in the name and style of Espy, Baker, & Robinson," upon a note made in the co-partnership name. After judgment against "defendants," the cause was brought into this court, and at the June Term, 1861, a judgment was rendered against them in their individual names, as well their sureties on the appeal bond. An execution was issued, and levied upon two lots in Fort Madison, one of them belonging to the firm, and the other the individual property of Espy, who now moves to set aside this sale of his lot, by showing that there was other firm property, of which the sheriff and all persons at the sale had notice, amply sufficient to satisfy the writ, and which was pointed out to him before the levy.

Thomas S. Espy, for the motion.

J. M. Beck, *contra*.

Wright, J. We are aware of the rule in equity, that partnership property should pay firm debts, and individual property individual debts. But suppose a judgment is rendered against persons composing a firm, in their individual names, if individual property is sold under an execution issued thereon, is the sale invalid, though there may be partnership means? We think not. The judgment is several, the writ runs against defendants, as individuals. No step further is necessary in the first instance (as by *scire facias*, or the like), to make individual property liable, and it is not irregular to levy and sell that which the writ commands the officer to seize. By his writ, he does not know of a joint liability, and his simple duty, primarily, is, to make the money from the property belonging to either of the defendants named. A creditor of either might, in a proper case, in equity, by a showing of all the facts, compel a resort to the partnership assets. But if this is not done, the individual debtor cannot complain of the illegality of the sale.

Our Code changes the common law, in providing that a partnership may be sued in its firm name. If thus sued, a *scire facias* is necessary, in order to reach individual property. If, however, a plaintiff follows, as he may, the common law requirement, of giving the

individual names, and thus serving and suing all, he may take the property of either partner in satisfaction of his writ. In such a case a *scire facias* is not necessary. *Motion refused.*

LOWE, J., dissenting.

STEVENS *v.* PERRY ET AL.

113 Mass. 380. 1873.

TRUSTEE process. The writ commanded the officer "to attach the goods or estate of John R. Perry and Patrick Grimes, co-partners under the name and style of Perry & Grimes," and to summon the Bay State National Bank as trustee.

The corporation filed this answer: "And now comes the Bay State National Bank, and, for answer, say, that they had in their hands and possession, at the time of the service of the plaintiff's writ upon them, no goods, effects, or credits of the said firm of Perry & Grimes, the defendants, and of this they submit themselves to be examined on oath, and ask to be discharged. And for a farther answer, they say that, at the time of the service of said writ upon them, to wit, on the ninth day of May, 1872, they had in their hands and possession, of the individual goods, effects, and credits of said John R. Perry, one of said firm, the sum of $922.77, but that since said service, to wit, on the twenty-third day of said May, said individual effects of said Perry have been attached to the amount of $1,800, on a writ sued out of this court and returnable at the September Term thereof, wherein the Swampscott Machine Company is plaintiff, said John R. Perry is defendant, and said bank is made trustee. Wherefore they ask to be discharged, and of this they submit themselves to be examined on oath."

The corporation appealed from an order charging it as trustee upon this answer.

C. U. Bell, for the trustee.

A. R. Brown and *E. A. Alger*, for the plaintiff.

AMES, J. It is well settled as matter of law in this Commonwealth, that, in a suit against two or more co-partners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner. Allen *v.* Wells, 22 Pick. 450; Newman *v.* Bagley, 16 Pick. 570. The Supreme Court of New Hampshire has in several cases held otherwise. Jarvis *v.* Brooks, 23 N. H. 136; Bowker *v.* Smith, 48 N. H. 111. But we must consider ourselves bound by our own decisions. As the debt due from the partners jointly is also due from each, it may be enforced against the separate property of each. It is immaterial whether this separate property is in the form

of goods and movable chattels, or goods, effects, and credits intrusted and deposited in such a manner that they can only be attached upon a trustee process. It is not necessary that the principal debtors should have made a joint deposit, or that the fund should belong to them jointly. It is enough if funds attachable upon a trustee process are due from the alleged trustee to either one of the principal defendants.

Trustees charged.

JAFFRAY ET AL. v. JENNINGS ET AL.

101 Mich. 515: 60 N. W. 52. 1894.

HOOKER, J. Plaintiffs were co-partners, residing in New York, and were jobbers, of whom the defendants (father and son, and also partners) purchased goods. The son, Ward L. Jennings, having purchased a quantity of goods for his firm from the plaintiffs, the latter commenced proceedings by attachment upon an affidavit which alleged that the defendants fraudulently contracted the debt upon which the action was brought, viz., that arising from the purchase mentioned. The writ was levied upon property belonging to the father, and upon his application the attachment was dissolved by the circuit judge. It was admitted that at the time of the levy the firm had sufficient personal property out of which the claim could have been satisfied.

Defendants' contention is that the individual property of the innocent defendant was not subject to seizure by attachment. Counsel for the plaintiffs build a strong argument upon the doctrine that each partner is an agent of his fellows, citing May *v.* Newman, 95 Mich. 501, to the proposition that an attachment lies against a debtor whose agent fraudulently contracted the debt. But the statute upon which the remedy by attachment depends has relieved the innocent partner from the application of this rule. An examination of the statutes may aid in solving this question. We start with the proposition that "attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms." See cases cited in 1 Jac. & C. Dig. p. 96, § 1; Estlow *v.* Hanna, 75 Mich. 219.

An action against joint debtors is like any other action. It is aimed at the individual debtors. A service on one is not a service upon the other; they may appear separately; their defences may be different; the judgment is against each for the whole amount; the execution issues against the individuals, the officer being commanded to collect the debt from the goods and chattels, and, for want thereof, of the lands and tenements of the individuals. And this is as true where the joint obligation is a partnership debt as in cases where the debtors are not co-partners. The act authorizing proceedings in attachment per-

mits any creditor to have an attachment against his debtor, upon conditions mentioned. The conditions are that he shall show that the defendant — i. e. the debtor — is believed to be guilty of certain acts, or to possess certain intentions regarding the debt or his property, fraudulent in character, the general tenor of which indicates danger that such debtor will put his property beyond the reach of the creditor. The law lays hold of the property of such debtor, to preserve it for the creditor. So long as there is a sole debtor, no difficulty is likely to arise, but when the debt is joint the question arises, how far should the fraudulent acts and intentions of one subject the property of another to seizure? The acts, if strictly construed, only provide for attachment against the debtor who is guilty of the fraud. An additional remedy, summary in its nature, is given against him. It is given, in terms, against no others. And where the act is done by one only, the law can only be made applicable to another by invoking the doctrine of agency.

No one will question the fact that one can, through an agent, subject his property to attachment; and this is as true where the agent is a partner as where he is not, and where the act complained of is the fraudulent purchase of goods by a partner, as in this case. There is much persuasiveness in the argument that, as the firm received the benefit and appropriated the fruit of the transaction (whether with knowledge upon the part of both or not), the rule that a partner is an agent of his co-partners makes his act the act of both. It would not be so convincing if the cause for attachment were another of those named in the statute, — e. g., if one only was shown to have an intent to dispose of the firm property, or had actually done so without the knowledge of his partner, or where he absconded, or removed out of the State, or was about to do so, with intent to defraud the firm creditors. Still more hard would be the attachment against one where his co-partner had merely resided out of the State for three months, which in itself is ground for attachment, regardless of the honesty of his intention. Can it be said that in all of these cases these acts are partnership acts, binding the partners under this application of the doctrine of agency? Is it true that the creditors of a firm in Michigan, one of the members of which lives in Chicago, have the absolute right to commence all actions against the firm by attachment, and to levy not only on the firm property, but that of each resident member, as well as that of the non-resident? If not, it must be that this doctrine is improperly applied, or a distinction must be drawn between the different causes for attachment named in the statute, and the liability limited to those acts which, we may say, either as a conclusion of fact or law, are the acts of the firm, which would seem to limit the cases to those where the debt was fraudulently contracted, and where the property of the firm had been assigned, concealed, or disposed of with intent on the part of one to defraud the firm creditors. If plaintiffs' theory is correct, these would be the acts of all partners, and subject to seizure not

only the partnership property, but the individual property of each partner, no matter how honest, and notwithstanding their solvency. There can be no doubt that partners are bound by the contracts, and many times by the torts, of one of their number, to the extent of liability. But is it as clear that the nature of the remedy is always subject to the same rule? As already stated, this remedy is statutory, and the statutes must show the design to cover such cases as this, or they are not to be treated as within them.

The attachment statute is borrowed from New York. It will be found in the Revised Statutes of 1838 and 1846 and the Compiled Laws of 1857. The section of which Howell (section 8015) is an amendment remained unchanged from the time of its adoption until 1861. It is section 19, c. 1, tit. 4, pt. 3, p. 512, Rev. St. 1838. The same is found in Rev. St. 1846, § 30, p. 517, and Comp. Laws, 1857, § 4771. It reads as follows, viz.: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, the attachment may be issued against the separate or joint estates or property of such joint debtors or any of them, and the same proceedings shall be had as hereinbefore prescribed." It goes without saying that under this act, where all of the joint debtors are shown to have participated in the statutory act, or where it appears that each has entertained the fraudulent intent, the writ should issue against all; and it is as plain that in such case the writ could be issued against the separate or joint estates of the debtors. So far it lays down a plain, consistent, and just rule. Shall we go further, and say that it was meant that the writ would be as far-reaching in cases of joint debtors, who are not partners, where one was innocent of wrong? That would probably not be claimed by any one. As to partners, the same claim might be made as is made here, viz., that in dealing with the partnership property the act of one is the act of all, and that the consequences are the same to all. But this act had received a construction before it became a law in Michigan. In the Case of Cyrus Chipman, an absconding debtor, 14 Johns. 217, decided in 1817, it was held that the attachment might issue against the property of one of several partners who absconds, for a debt due by the firm, although his co-partners are resident within the State, and subject to process. This is not conclusive of the question here, and is cited only to show that counsel in that case did not resort to the remedy by attachment against all of the partners. Two years later the same court held that an attachment might issue against the separate property of an absconding debtor upon a debt due from his co-partnership. Here, again, the writ appears not to have been sought against the partners who remained. But the case went further, and held that the partnership property could not be seized; and the reason was that the other partner had a right to retain it to pay the partnership debts. *Ex parte* Smith, 16 Johns. 102.

It may still be said that in neither of these cases were all of the partners sued in attachment, and therefore there yet remains doubt if

the right contended for does not exist under this statute, and it is probable that such doubts led to the amendment of 1861, which reads as follows: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of said section; and the officer shall be also directed in said writ to summon all such joint debtors as may be named in the affidavit attached thereto, to answer to the said action as in other cases of attachment." Before discussing the statute let us review the situation. Under the previous statute, attachment lay against all joint debtors, whether partners or not, where it could be shown as matter of fact that all participated in the act constituting a cause. It was also plain that, where one joint debtor only committed such act, his property only was subject to the writ, unless there was a partnership. There was, then, no necessity for legislation to reach either of these cases, for joint debtors, where not partners, were fully protected where innocent of wrong, and the creditor had his remedy against both where both participated, and against the offender where only one was guilty. In this condition of affairs, the legislature passed section 8015, thereby giving immunity from attachment to joint debtors, including partners, who were not themselves participants in the wrongful act. Now, by a construction of this act, it is sought to say that partners are not within its terms, because the act of one is the act of all, and that, as a matter of law, they are, therefore, all participants in the fraudulent act. If that is so, the statute seems to have no office to perform. It has relieved nobody. Joint debtors, not partners, could not be attacked by attachment before unless guilty. But there may have been a doubt about partners. That doubt seems to have caused the enactment of a law whose only object must have been to reach and relieve the very class of cases which the construction contended for seeks to exclude from its protection.

As said at the outset, attachment is a harsh and extraordinary remedy. The law may well restrict its use, and deny it as against all honest persons, though they have the misfortune to be connected in business as partners with dishonest persons. Such persons have legal obligations to discharge in relation to the partnership affairs. They must see that obligations are discharged, and the law presumes that they will faithfully do so. No very good reason suggests itself why the private fortune of an honest partner should be seized because his partner has been detected in a fraudulent act in connection with partnership affairs. It is common knowledge that few men or firms can survive an attack by attachment. It is the almost certain precursor of insolvency, as in former days it was of bankruptcy, and we should hesitate before broadening the scope of the act in question. A case quite similar to the present was before the court, viz., Edwards *v.*

Hughes, 20 Mich. 290. Mr. Justice Cooley wrote the opinion, and seems to have taken a similar view of these statutes to that expressed above. It is true that the facts in that case may permit it to be distinguished from the present, but the language used is broad, and it is hardly possible that the court could have overlooked the contingency of such cases as this. Since this decision we think the bar have understood that the liability was limited to such partners as personally participated in the fraudulent act. See Tiffany's Justice Guide, p. 60, note 1, where this doctrine is laid down; Shinn, Pl. & Pr. § 307. See also People *v.* Circuit Judge, 41 Mich. 326, where a writ issued against non-resident partners only. We think the learned circuit judge correct in his conclusions, and that his order dissolving the attachment should be affirmed, with costs.

Ordered accordingly.

LONG and GRANT, JJ., concur with HOOKER, J.[1]

YERKES *v.* McFADDEN ET AL.

141 N. Y. 136. 1894.

THIS action was brought against defendants, who were non-residents, as co-partners, to recover rent due, etc., under a lease. On August 1, 1892, an order was obtained for service of the summons by publication, and on August 15, 1892, a warrant of attachment was procured and a levy made thereunder upon firm property. The publication of the summons was commenced during the first week of August in two newspapers, and, as directed by the order, continued for six weeks in one, but in the other, by mistake of the printer, was discontinued after a publication for five weeks; but after an interval of two weeks, upon discovery of the mistake, it was renewed and directed to be continued six weeks. On August 26, the summons was personally served upon one of the defendants, but no personal service was made on the other two. The Special Term denied a motion by defendants to vacate the attachment; this order was reversed by the General Term, and plaintiff appealed to this court.

John M. Roe, for appellant.

O. P. Hurd, for respondent.

ANDREWS, CH. J. We think the General Term erred in vacating the attachment as to the two appellants in that court, although publication was not commenced against them within the prescribed period. The action was upon a joint liability of the three defendants. Personal service was made on the third defendant, August 26, 1892, thirteen days after the warrant of attachment was granted, and

[1] The dissenting opinion of MONTGOMERY, J., in which McGRATH, C. J., concurred, is omitted.

the attachment was levied upon the joint property of the firm. In an action against joint debtors service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served. Code, §§ 1932–1935; Sternberger *v.* Bernheimer, 121 N. Y. 194. The same rule applies in case of attachment. Where an attachment issues against the property of several defendants in an action on a joint liability, it may be executed by a seizure of the joint property, and although the summons is served on but one of the defendants within the time prescribed, and no service is made or publication commenced against the other defendants, the attachment cannot be vacated as to them for that reason. The attachment and the lien continues, and if the plaintiff obtains judgment on the joint liability, the joint property seized on the attachment may be sold on execution. The right to seize the joint property on an attachment in an action against joint debtors, although the summons is served on one only, is the same as in the case of an execution on a joint judgment under similar circumstances. Smith *v.* Orser, 42 N. Y. 132.

The case of Staats *v.* Bristow, 73 N. Y. 264, has no bearing upon this question. There, in an action brought for a co-partnership debt, an attachment was issued against the property of one of the co-partners only, on the ground that he was a non-resident, on which his interest in the co-partnership was levied upon. The co-partnership was at the time insolvent. After the seizure on the attachment, the firm made a general assignment for the benefit of creditors, and subsequently, on obtaining judgment in the attachment action, the interest of the attachment debtor in the firm property was sold on execution. An action was brought to determine the respective rights of the purchaser on the execution sale, and of the assignee for creditors in the property; and it was held that the plaintiff acquired nothing by his levy and sale, because the interest of the attachment debtor in the property was nothing, as the firm was insolvent, and that the assignee acquired title to the *corpus* of the property under the assignment.

In this case the attachment was against the joint property, and if good as against one of the defendants, was good against all. The lien was not lost, nor could the attachment be vacated as against any of the defendants, there having been a valid service of the summons, within the time prescribed by § 638 of the Code, upon one of the defendants.

The order of the General Term should be reversed, and the order of the Special Term affirmed, with costs.

§ 1. Effect of Novation.

KIRWAN v. KIRWAN et al.

2 C. & M. 617: 4 Tyrwh. 491. 1834.

The defendants, C. Kirwan, M. Kirwan, & N. Kirwan, as partners under the name of J. Kirwan & Sons, became indebted to plaintiff's intestate. C. Kirwan retired from the firm, and M. and N. Kirwan agreed to liquidate the firm affairs. Later, M. Kirwan retired, and the dissolutions of both partnerships were published at the same time in the "Gazette." Then, N. Kirwan took into partnership, in the old firm name, one Kelly. The intestate's account was transferred to the new firm, and he received accounts and payments from them. Other important facts appear in the opinion. It was agreed that the court should decide upon the matters of fact set out in the special case, as well as upon the matters of law.

Follett, for the plaintiff.

Coleridge, *Serjt.*, *contra*.

Lord Lyndhurst, C. B. In this case money was originally advanced to the three defendants, and therefore they are jointly liable, unless they can show affirmatively on their side, to the satisfaction of the court, something in point of law to discharge them. We cannot go out of the special case. Upon that it is contended that we may come to the conclusion that the intestate, and subsequently the plaintiff, agreed to take two of the partners, Matthew & Nicholas, as debtors, and to discharge the third, Clement. For the purpose of making out that proposition, two circumstances are relied upon. In the first place, that notice of dissolution had been given, in which it was stated that Matthew & Nicholas would liquidate the partnership debts. But it is not stated that any notice was given to Anthony (plaintiff's intestate), nor is notice brought home to him. Reliance is then placed upon the letter of Nov. 25, 1825, to Clement, which is in these terms: "Dear Brother, I received your letter yesterday: I was very well aware that, on your dissolving partnership with Mr. Nicholas, I had no further claim on you." Now, if I am to act the part of a juryman, I cannot say that the expressions in that letter lead me to the conclusion that there was any agreement to accept Matthew & Nicholas as debtors. The next question is, Did Anthony engage to take Nicholas & Kelly as his debtors? As far as the facts go, there was a transfer of the balance, accounts were rendered, and payments made on the part of the new firm, which it is argued were sufficient to render Kelly liable, if Anthony assented to take him and N. Kirwan as his debtors. But there is nothing to satisfy my mind that he did so consent. Then, as there is nothing that satisfactorily proves a transfer of Anthony's debt to the two brothers, Matthew

and Nicholas, or to Nicholas & Kelly, the consequence is, that the original debtors remain liable, and that this action is properly brought against them.

Judgment for plaintiffs.[1]

LYTH *v.* AULT ET AL.

7 Exch. 669. 1852.

PLAINTIFF sued for goods sold and delivered. Defendant Ault, in his second plea, stated that the goods were purchased by the defendants Ault and Wood, as partners; that, later, defendants dissolved partnership, and plaintiff, in consideration of £12 part payment, and of defendant Wood's becoming solely and separately liable for the residue of the debt, agreed to accept, and did accept, the defendant Wood alone as her debtor for the residue, and relinquished her claim against defendant Ault. Verdict for the defendant upon this plea.

Cowling moved for a rule calling on the defendant to show cause why judgment should not be entered for the plaintiff on the second issue, *non obstante veredicto.*

PARKE, B. The principle which governs this case is to be found expounded in Thompson *v.* Percival, 5 B. & Ad. 925. It is clear that where there is an accord and satisfaction by the debtor agreeing to give something totally different in its nature from the debt, and which the creditor agrees to accept in satisfaction of the debt, the court cannot inquire into the value of that which is the subject matter of the new agreement; and therefore there is nothing to prevent the parties from agreeing that a horse, or a bill of exchange, or any other commodity, shall be given in satisfaction of a larger demand. There is a very strong case to be found in Dyer, of Andrew *v.* Boughey, p. 75 a, where, to a declaration for delivering 373 lb. of bad wax, upon an assumpsit for 400 lb. of good wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed, a plea of 20 lb. of wax given and accepted in satisfaction was held good. The court proceeded upon the ground that they were not at liberty to go into the value of the consideration of the new agreement, provided the thing differed in itself. The law leaves the parties to their bargain.

Now it cannot be doubted that the sole security of one of two joint debtors may be more beneficial than the joint responsibility of both. In the latter case, you are not entitled to sue one with safety, for the defendant may plead in abatement the non-joinder of his co-contractor. In the case of the bankruptcy of one of the partners, there would also

[1] The statement has been shortened, and the concurring opinions of PARKE and BOLLAND, BB., have been omitted.

be a difference. In the case put by my LORD CHIEF BARON, of two debtors, where one is a rich old man and the other is young and without property, it might be much more advantageous to the creditor to have his sole remedy against the former, for he would have the security of the personal and real estate of the rich debtor, which he would not have at law in case the old man were to die first. Where there is more than one debtor, the creditor's right is different. There is, therefore, no doubt that the thing substituted is altogether different from the original debt.

In Thompson *v.* Percival, it is said by the Court of King's Bench, that, in the case of Lodge *v.* Dicas, 3 B. & C. 611, the difference between the joint liability of two and the separate liability of one does not appear to have been brought under the consideration of the court. The case of Lodge *v.* Dicas rested upon a totally different ground from the present, for there the consideration for the discharge of the one defendant (Dicas) was the allowing the other partner to collect the partnership debts; and the court held that as there was no evidence that that fact was known to the plaintiffs, there was no consideration whatever for the plaintiffs' promise; but the point which now arises was not taken by the counsel or acted upon by the court. This point, however, was much considered in Thompson *v.* Percival, and the decision there was wholly irrespective of the fact that a bill had been given. As I am, therefore, clearly of the opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action.

Rule refused.[1]

IN RE HEAD. HEAD *v.* HEAD. No. 2.

[1894] 2 Ch. 236.

G. HEAD, whose estate was being administered in this action, died Dec. 10, 1890, a partner in a banking firm consisting of himself and of his son G. S. Head. The son continued to carry on business after the father's death under the old firm name.

The claimant, A. Tester, at the time of G. Head's death, had a balance to his credit in the bank of £501 11*s.* 6*d.* Between that date and Dec. 24, 1890, he drew out £22 8*s.*, and paid in £122 10*s.* On Dec. 24, knowing of G. Head's death, claimant went to the bank and told G. S. Head that he wished to draw out £500 for investment.

[1] The statement of facts is abridged, and the concurring opinions of POLLOCK, C. B., and ALDERSON, B., are omitted. Luddington, *v.* Bell, 77 N. Y. 138 (1879), *accord.* Motley *v.* Wickoff, 71 N. W. 520, *ante*, p. 293, *contra.*

Head advised him not to do so, and told him that if he would place it on a deposit account he would pay him interest at 3½ per cent. To this the claimant consented. G. S. Head then gave him the following deposit receipt for £500:

East Grinstead Bank. Deposit receipt, Dec. 24, 1890. Rec'd of Mr. A. Tester, the sum of £500.

For G. & G. S. HEAD. G. S. HEAD.

This deposit receipt bears interest at 3½ per cent per annum, if left undisturbed for six months. It is repayable only after 21 days' notice.

On the same day the £500 was transferred from the claimant's account to a deposit account. The bank stopped payment on Feb. 24, 1892, and G. S. Head was subsequently adjudicated a bankrupt. Between the date of G. Head's death and the stoppage of the bank, claimant drew out of his current account more than £501 11*s.* 6*d.*, and also paid in various sums, having at the date of the stoppage of the bank overdrawn his current account to the extent of £31 0*s.* 10*d.* The claimant sought to prove against G. Head's estate for £479 3*s.* 6*d.*, the balance on the current account at the time of the death, less £22 8*s.* drawn out between that date and Dec. 24, 1890.

MR. JUSTICE CHITTY held that the placing of £500 at the surviving partner's request on deposit at interest constituted a novation, and that the case was distinguishable from the claim of Mrs. Reynolds in the same action.[1] The claimant appealed.

Swinfen Eady, Q. C., and *Eve*, for the appellant.

R. F. Norton and *Ernest Hatton*, for respondent, were not called on.

LINDLEY, L. J. I do not think there is any doubt in this case. The customer went to the surviving partner in the bank, and said he should draw out the principal part of the balance on his current account. The banker asked him not to do this, but to place it on deposit; and the customer consented. It seems to me that the case is the same as if the customer had drawn a cheque for the amount, and put the money in afresh on a deposit account, the money being paid out and re-lent on a totally different contract from that which existed

[1] *In re* Head [1893], 3 Ch. 426. "CHITTY, J. The question I have to decide is one of novation. It appears that Mrs. Reynolds, one of the customers of the bank, left £1,400 on deposit with the original firm of G. & G. S. Head, for which she received a deposit receipt in the usual form. After the death of G. Head, the business was carried on by G. S. Head alone. Mrs. Reynolds was aware of this fact, and on several occasions she withdrew some of her money, on one of them, viz. Dec. 14, 1891, receiving a fresh deposit note for the balance of £850 in precisely the same terms with her old deposit note, except that the amount due was £850 instead of £1,400. On this it has been argued that there has been a novation, or, in other words, that there has been an agreement on the part of Mrs. Reynolds to discharge her orignal debtor, G. Head, and accept the liability of G. S. Head alone in substitution for the joint liability of G. & G. S. Head. The giving of a fresh deposit note to a customer who withdraws any part of his deposit seems to have been only a convenient, and very usual way, of writing off a part of the debt due from the bank; but it is not sufficient evidence of novation to discharge the original debtor from liability." The claim was allowed.

in regard to the current account. It is not like the cases which have been cited. Harris *v.* Farwell, 15 Beav. 31; Heath *v.* Percival, 1 P. Wms. 682. When the money was placed on deposit, the course of dealing with it was changed. I think it would be unfair to charge the estate of the deceased partner. In my opinion, MR. JUSTICE CHITTY was right, and the appeal must be dismissed.

LOPES and KAY, L. JJ., delivered concurring opinions.

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§ 1. EFFECT OF JUDGMENT AGAINST ONE PARTNER.

MASON *v.* ELDRED ET AL.

6 Wall. (U. S.) 231. 1867.

ON certificate of division between the judges of the Circuit Court for Wisconsin. A statute of Michigan, known as "the Joint Debtor Act," Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219, thus enacts:

1. "In actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such a case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process.

2. "Such judgment shall be conclusive evidence of the liabilities of the defendants who were served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Other sections provide that execution shall be issued *in form* against all of the defendants; that the execution shall be levied on the sole property of the defendant served, or on the joint property of all the defendants, and that the plaintiff may sue out a *scire facias* against the defendants not served to show why the plaintiffs ought not to have execution against them, the same as if they had been served with the process by which the suit was commenced.

With this statute in force in Michigan, Mason sued, in the Circuit Court for Wisconsin, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on Anson Eldred alone, who alone appeared, and pleaded *non assumpsit*. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the State courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership; where, though Elisha Eldred

was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat a recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the Circuit Court were opposed.

G. W. Lakin, for the plaintiff.

J. W. Cary, *contra.*

FIELD, J. The counsel of the plaintiff suggests that the question presented by the certificate of the judges of the Circuit Court is divisible into two parts: 1st. Whether the record of the judgment recovered in Michigan was admissible under the pleadings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. Young *v.* Black, 7 Cranch, 565; Young *v.* Rummell, 2 Hill, 480. On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a co-partnership note is the several obligation of each co-partner, as well as the joint obligation of all, and that a judgment recovered upon the note against one co-partner is not a bar to a suit upon the same note against another co-partner; and the latter position is insisted upon as the rule of the common law, independent oi the Joint Debtor Act of Michigan.

It is true that each co-partner is bound for the entire amount due on co-partnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his co-partners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the co-partners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in co-partnerships

there is no such several liability of the co-partners. The co-partnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all co-partnership transactions this common risk and liability exists. Therefore it is that in suits upon these transactions all the co-partners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the co-partnership contract was the several contract of each co-partner.

The language of Lord Mansfield in giving the judgment of the King's Bench in Rice *v.* Shute, Burrow, 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a co-partnership contract the several contract of each co-partner, as well as the joint contract of all the co-partners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each co-partner was so far several that in a suit against him judgment would pass for the whole demand, if the non-joinder of his co-partners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one co-partner on a co-partnership note does not constitute a bar to a suit upon the same note against another co-partner, the plaintiff relies upon the case of Sheehy *v.* Mandeville & Jamesson, decided by this court, and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a co-partnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two co-partners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different States. It was elaborately reviewed by the Supreme Court of New York in the case of Robertson *v.* Smith, 18 Johnson, 459, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of Robertson *v.* Smith was made. Ward *v.* Johnson, 13 Massachusetts, 148. In Wann *v.* McNulty, 2 Gilman, 359, the Supreme Court of Illinois

commented upon the case of Sheehy *v.* Mandeville, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several State courts — referring to those of New York, Massachusetts, Maryland, and Indiana — was more consistent with the principles of law, and was supported by better reasons.

In Smith *v.* Black, 9 Sergeant & Rawle, 142, the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to Sheehy *v.* Mandeville, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In King *v.* Hoar, 13 Meeson & Welsby, 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the Court of Exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of Sheehy *v.* Mandeville was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in Trafton *v.* The United States, 3 Story, 651, refers to this case in the Exchequer, and to that of Sheehy *v.* Mandeville, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued

separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common law rule were to govern the decision of this case, we should feel obliged, notwithstanding Sheehy *v.* Mandeville, to hold that the promissory note was merged in the judgment of the Court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that State, Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219, the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. D'Arcy *v.* Ketchum, 1 Howard, 165. Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the State to limit the operation of the judgment thus recovered. The State can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the State of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the court, if found within the State, that such parties may be sued upon the original demand.

In Bonesteel *v.* Todd, 9 Michigan, 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded

the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the Joint Debtor Act of New York, process in that State having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the Supreme Court of the State this ruling was held to be erroneous. After referring to decisions in New York, the court said: "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In Oakley *v.* Aspinwall, 4 Comstock, 513, the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the Joint Debtor Act of that State upon the original demand. Mr. Justice Bronson, speaking for the court, says: "It is said that the original demand was merged in, and extinguished by the judgment, and consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the Joint Debtor Act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that State, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

NATHANSON *v.* SPITZ ET AL.

31 At. (R. I.) 690. 1895.

Tillinghast, J. At the time of the suing out of the plaintiff's writ in this case, the defendants, Samuel Adams and Jacob Spitz, were copartners in business, under the firm name of Adams & Spitz, at Boston,

in the State of Massachusetts, where they both resided. The writ was served by arresting the defendant Spitz while temporarily in this State, and by sending an attested copy of said writ by mail to the defendant Adams, at Boston. The defendant Spitz entered a special appearance for himself, and filed a plea in abatement, on the ground that there had been no legal service upon the defendant Adams, the other joint obligor in the contract sued on; to which plea the plaintiff demurred. The only question raised, therefore, by the pleadings, is as to the sufficiency of said service. The substance of the contention of counsel who appears for said Spitz in support of his plea in abatement is: First, that the liability of partners on a firm obligation is, during the lives of the partners, joint, and not joint and several, and hence that the partners must sue and be sued jointly; and, second, that, in regard to service of process, the common law makes no distinction between partners and other joint obligors, and hence that they all must be served with process before judgment can be obtained against any of them, even though some are non-residents.

As to the first point: It is doubtless true that, independently of any statute, the liability of a partnership for the debts thereof is a joint and indivisible liability, and hence that all of the partners must be joined in a suit for the recovery of such debts. Dicey, Parties (Truman's Notes), p. 285, rule 56; Bates, Partn. Lib. ed. § 1049; Pearce *v.* Cooke, 13 R. I. 184; Page *v.* Brandt, 18 Ill. 37; Kent *v.* Holliday, 17 Md. 387; Bell *v.* Donohoe, 17 Fed. 710.

As to the second point: At common law, when one of several joint defendants was out of the jurisdiction of the court, so that it was impossible to obtain service upon him, the plaintiff might institute proceedings of outlawry against such non-resident defendant; and, after judgment of outlawry had been obtained against him, the plaintiff could proceed to recover a separate judgment against the defendants served with process. 2 Cooley's Bl. pk. 3, pp. 281, 282; Edwards *v.* Carter, 1 Str. 473; Tidd, Prac. *423; 1 Chit. Pl. Lib. ed. *49. The proceeding of outlawry in civil cases, however, is unknown in the United States; and, if there are any cases of outlawry in criminal cases even, they are very rare. In England, also, it has long been obsolete in civil proceedings, and was formally abolished by the civil procedure acts. Repeal Act, 1879; 42 & 43 Vict. c. 59. In criminal proceedings even, it is but little used, but is formally kept alive by 33 & 34 Vict. c. 23. In Hall *v.* Lanning, 91 U. S. 168, Mr. Justice Bradley, in delivering the opinion of the court, said: "In most of the States legislative acts have been passed, called 'Joint Debtor Acts,' which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and if the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the

common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the State, but not the separate property of those not served; and, while they are binding personally on the former, they are regarded as either not personally binding at all or only *prima facie* binding on the latter."

In this State, while there is no statute which in express terms goes to this extent, although by § 17, c. 13, of the Judiciary Act, partnership debts become joint and several on the decease of one of the partners, Pearce *v.* Cooke, 13 R. I. 184, yet there is a statute which practically accomplishes the same result. We refer to § 18 of c. 13 of the Judiciary Act, which provides as follows: "No judgment, without-complete satisfaction, rendered against a part only of the defendants in any action upon a joint contract, shall be a bar to any future action on said contract, for any unsatisfied balance due, against such of the defendants upon whom, or whose estate the writ in the original action shall not have been served." It is clearly to be implied from this statute that service on a part only of the defendants, in an action upon a joint contract, is sufficient to give the court jurisdiction. And it is, doubtless, by reason of the existence of said statute, which appears in substantially the same form as early as the Revision of 1844, that the settled practice in this State, in cases like the one now before us, has been to serve the writ upon such of the defendants as are within the jurisdiction thereof, and to proceed only against them for the breach of such contract. See Winslow *v.* Brown, 7 R. I. 95. Moreover, we see no reason why the return of *non est inventus* made by the sheriff in this case as to the defendant Samuel Adams may not properly be treated as equivalent to the common-law process of outlawry. The writ was properly sued out against both of the defendants, and the return thereon shows that the plaintiff has done all that he could to bring them both into court; and, having succeeded as to one of them, it would seem that he ought to be allowed to proceed to obtain a judgment against him. See Dillman *v.* Schultz, 5 Serg. & R. 36; Tappan *v.* Bruen, 5 Mass. 193. But, however this may be, we are clearly of the opinion that, under the statute above quoted, and the uniform practice in this State, the case at bar may properly proceed against the defendant Spitz, upon whom only the writ was served.

The demurrer is therefore sustained, and the plea in abatement overruled.

§ 1. Remedies against Dormant Partners.

ROBINSON *v.* WILKINSON.

3 Price, 538. 1817.

Cay and Wilkinson were part-owners of the ship Lord Eldon, and partners in its management. Robinson furnished supplies and cash for the ship, not knowing that Wilkinson was a partner, but supposing that Cay was sole proprietor. Cay, becoming insolvent, induced Robinson to take a bill drawn by Cay on one Wilson, and accepted by the latter for 13*s.* in the pound of Robinson's claim. The bill was negotiated by Robinson, was dishonored,— both Cay and Wilson having become bankrupts before the bill matured, — and Robinson, having discovered that Wilkinson was a partner when the debt was contracted, brought this action against him for its recovery. Verdict for the plaintiff.

Ganselee, for the plaintiff.

Lawes, E., *contra.*

Richards, B. The question is, whether this defendant is discharged by anything that has taken place. Whatever effect any or all of these transactions might have had if Wilkinson had been known to be a partner of Cay, is entirely put out of this case, because the plaintiff certainly dealt entirely with Cay, and knew nothing of Wilkinson, who was, nevertheless, clearly *prima facie* liable.

It is clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner. If it were otherwise, and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships. If the plaintiff had originally known that this defendant had been a partner, he would not have dealt with Cay alone, or if he had discovered it earlier, he would probably not have done many of those acts which, without such knowledge, he has done. It is quite clear that this verdict ought to stand for the £380 16*s.* 1*d.* *Postea to the plaintiff.*

Concurring opinions were delivered by Graham and Wood, BB.

MOHAWK NAT. BANK *v.* VAN SLYCK et al.

29 Hun (N. Y.), 188. 1883.

Action upon two promissory notes payable to the order of defendant Toll, indorsed by him, discounted by the plaintiff, not paid at maturity, and duly protested. Plaintiff claimed that all of the defend-

ants were partners, that the notes belonged to the firm and that Toll's indorsement was the firm's indorsement. The notes in suit were given by the makers for the purchase price of brooms sold to them by Toll in his own name, but which, the evidence showed, were owned by the defendants, as partners under an agreement, which was kept secret from the plaintiff. Toll was also engaged in selling brooms on his own account. While his individual business and the business carried on under the agreement were kept separate, and separate books were kept by Toll, the banking transactions of each business were conducted by Toll with plaintiff in his own name, and in one account. When plaintiff discounted the notes in suit, it did not know of the partnership, and discounted them on the credit of the makers and of Toll. From a verdict for plaintiff directed by the court, the defendants other than Toll appealed.

S. W. Jackson, for the appellants.

Alonzo P. Strong, for the respondent.

Learned, P. J. . . . The agreement shows that the business was to be done in the name of Toll. He was to purchase and to sell, — in whose name if not in his own? He was to insure expressly in his own name. Therefore his name was the partnership name. Bank of Rochester *v.* Monteath, 1 Den. 402; Nat. Bk. *v.* Landon, 45 N. Y. 410; Ontario Bk. *v.* Hennessy, 48 Id. 545.

Again, the notes in question were given by the makers in payment of brooms belonging to the defendants, which brooms were sold to the makers by that one of the defendants who had charge of the business, and were sold by their directions. The notes therefore were the property of the defendants, payable to them, under the name by which they were conducting the business. Until the rights of *bona fide* holders should intervene, the defendants might claim that these notes were their property, and were not the property of Toll individually. When, therefore, Toll indorsed the notes, the indorsement was that of the partnership, because the notes were payable to the partnership and belonged to the partnership. The liability then of the defendants to the plaintiff does not rest upon the plaintiff's knowledge, but upon the fact that by the indorsement the defendants' property was transferred to the plaintiff. If Toll had sold brooms belonging to the defendants, they would have been bound by the terms of the sale; for instance, to guaranty the title or the quality. He sold to plaintiff two notes which belonged to the defendants, and they are bound by the terms of that sale, one of which was the guarantee of indorsement. Winship *v.* Bank of U. S., 5 Pet. 529. . . .

Judgment affirmed.[1]

[1] The statement has been abridged, and a part of the opinion is omitted.

ELMIRA IRON &c. CO. *v.* HARRIS ET AL.

124 N. Y. 280. 1891.

THE action is brought to recover upon liabilities of Blood & Co., originally composed of the defendants. Harris alone defends, on the ground that several years prior to the transactions in suit he had withdrawn from the firm. Notice of his withdrawal was not given to the plaintiff, but defendant insists that he was a dormant partner, and therefore not bound to give notice of his retirement from the firm to those with whom the firm had dealt prior thereto for an indebtedness subsequently incurred by those who continued to carry on the business. The material facts are stated in the opinion. From a verdict for the defendant the plaintiff appealed.

Frederick Collin, for appellant.

J. A. Gibson, for respondent.

PARKER, J. The question to be determined is presented by an exception taken to the refusal of the court to direct a verdict in favor of the plaintiff. The plaintiff insisted that it was the duty of the court to determine, as a matter of law, that the defendant, while a member of the firm of Blood & Co., was an ostensible partner. The trial court held otherwise, and submitted to the jury the question whether Harris was an ostensible or dormant partner, with the further instruction that if they should find that he was a dormant partner, then the defendant was entitled to a verdict.

Now it is the general rule that a partner can only relieve himself from a liability for subsequent transactions had with his former partners, in the partnership name, by giving notice of his withdrawal. Austin *v.* Holland, 69 N. Y. 571; Howell *v.* Adams, 68 Id. 314; Elkinton *v.* Booth, 143 Mass. 479. The rule is founded upon the principle governing the liability of a principal for the acts of his agent, where an agent has once represented his principal, if the principal would avoid responsibility for his acts in the direction of his original authority after the agency has ceased, it is incumbent on him to notify those with whom he has dealt that such relation no longer continues. And a partner in dealing with third parties in behalf of the partnership not only acts for himself but as agent for each of the other members of the firm. So that when a partner withdraws from a firm, it is his duty to give notice of that fact in order that it may be understood that his former partners have no longer any right to represent him. And if he fail to discharge that obligation he cannot, thereafter, avoid liability for an indebtedness incurred in the partnership name to a party unaware of the changed situation.

It appears that a notice of dissolution was, at the time, published in a local paper, but that could only affect those who should deal with the firm for the first time, after the withdrawal. It did not operate as a notice to plaintiff, with whom the firm had had business relations

prior thereto. As to it, actual notice could alone suffice. It was not given, and therefore defendant is chargeable with the indebtedness sought to be recovered, unless he is entitled to the protection of the one exception to the rule continuing the liability of partners after dissolution, who fail to give notice. A dormant partner need not give notice, and the jury have been permitted to find that such was Harris' relation to the firm of Blood & Co. Whether rightly, we must now consider. The first step in that direction is to ascertain what is meant by the term dormant partner. Bouvier defines dormant as sleeping, silent, not known, not acting. "A dormant partner," says Collyer, Partn. 6th ed. p. 11, "is he whose name and transactions as a partner are professedly concealed from the world, . . . is one who shares in the profits of a business, but is not known as a member of the firm." A dormant partner is one "taking no part in the management of the partnership." Lindley on Partn. 16. "We think, however, the word implies both the quality of secrecy and inactivity." Pars. on Partn. § 3.

In National Bank *v.* Thomas, 47 N. Y. 15, 19, the court said: "A dormant partner is one who takes no part in the business and whose connection with it is unknown. Both secrecy and inactivity are implied by the word." As the court cited North *v.* Bliss, 30 N. Y. 374, as well as other authorities in support of the definition given, it is clear that it did not understand or intend that the North case should have the effect of altering a rule which had been long settled as asserted by it. It follows that one occupying such a relation to a partnership need not give notice, because, his connection with the firm not having been known, it cannot have contributed in any degree towards establishing the credit of the firm, and, consequently, his withdrawal could not take away a single element which helped to build up the business reputation and credit of the partnership. Such we deem the rule, and it should not be extended. Credit is a matter of such importance in the mercantile world, and the financial standing of any partner may, through various sources, be so readily commingled with that of his firm that it is essential that he should be required to take the precaution of giving notice of withdrawal, unless it clearly appears that his connection with the firm did not add to its reputation for responsibility.

It is not attempted here to establish a partnership liability against Harris on the ground of estoppel, which would have burdened the plaintiff with the necessity of establishing that he held himself, or knowingly permitted another to hold him out as a partner; that the plaintiff had knowledge of such holding out, and was induced thereby to create the debt. And the authorities applicable to such a situation, of which Thompson *v.* First Nat. Bank, 111 U. S. 529, is a type, need not be considered.

The written agreement entered into between the Bloods made the parties actual partners. It neither limited the liability or agency of

either. It did not suggest that Harris' connection with the firm should be kept secret. It did not provide that Harris should, as to its business, be wholly inactive. It required each of the Bloods to give his entire time and attention to the business, for which each was to be paid $600 per annum. While as to Harris, who was engaged in other business, it was agreed that he should "be consulted in the business, and all plans and operations of the firm shall be made and done with the advice of the firm: and the said N. C. Harris is to have and receive from the firm $100 per year for his services for the care and assistance which he may render to the firm without giving his personal attention to the business."

The agreement, therefore, does not indicate that it was the intention of the parties that Harris should be a secret partner, sharing in the profits as a reward for his contribution to the capital, without contributing in any other manner to the standing and business of the firm. Neither was he, in fact, inactive during the seven years that elapsed before his withdrawal. While he did not engage in the purchase of material, or the sale of manufactured articles, he did take part, to some extent, in the financial management of the partnership, and in the settlement of controversies, in which he wrote letters over his own signature as well as that of the firm. During some portions of the partnership period he was frequently about the shops, at times nearly every day, looking over the work, and occasionally speaking to the different foremen about it. Neither did his partners keep secret the fact of his connection with the firm.

John C. Blood testified: "I presume it was known by quite a number that Mr. Harris was a member of the firm of Blood & Co.; if a person asked me who had a right to know, I told them; those who had a right to know were the men dealing with us, and the men who were dealing with us who asked me were told that Mr. Harris was a member of the firm; I could n't tell you how many I did tell." Samuel N. Blood testified: "Q. Was his connection with the firm kept secret by you, or by anybody else, to your knowledge? A. It was not by me at all. Q. Did you tell persons inquiring that he was a member of the firm? A. I did, sir. Q. And talked of it with persons doing business with you generally? A. I did, sir, whenever the question came up."

Again, the adoption of the firm name of Blood & Co. is in opposition to the claim of dormancy on the part of Harris. A dormant partner is one who becomes such by a secret arrangement, while his associates are held out to the world as sole proprietors and managers of the business. Beecher *v.* Bush, 49 Mich. 188, 203. If the business had been carried on under the firm name of Blood & Blood, or Blood Bros., then the Bloods would have been held out as comprising the entire firm. But the words "& Co." indicate an agency, and that a principal or principals are undisclosed, and, if credit is given, the law presumes that it was given to all the principals.

In Shamburg *v.* Ruggles, 83 Pa. St. 148, the court say: "If A., B., & C. enter into articles of association, and agree that the business shall be conducted by A., and in his name alone, B. and C., in such case, are dormant partners, and though liable for the debts and obligations of the firm, during its continuance, are not so liable for debts after its dissolution, although notice of such dissolution may not have been given to the public, or those previously dealing with it, for it is to be presumed that credit was given upon the responsibility of A. alone, and not upon that of B. and C. If, however, the business be conducted in the name of A. & Co., a different presumption arises, for then it is supposed that credit is given not to A. alone, but to all those composing the company; in other words, to the firm, and not to any one individual of it. In such case, if B. or C. retire, notice must be given to those dealing with the firm, or he will continue to be liable for the debts thereof, subsequently contracted with former creditors, who may be ignorant of the dissolution." To the same effect is the reasoning of the court in Deford & Co. *v.* Reynolds, 36 Pa. St. 325; Pordrasnik *v.* Martin, 25 Ill. App. 300; Dering *v.* Flanders, 49 N. H. 225; Clark *v.* Fletcher, 96 Pa. St. 416.

Notwithstanding the terms of the agreement of partnership, the adoption of a firm name which did not exclude the defendant, the announcement by each of the Bloods to those making inquiries and having dealings with the firm that Harris was one of the partners, and the further fact that he, to some extent, participated in the settlement of accounts and the financial management of the business, — facts which, standing alone, determine that Harris' status in the firm was that of an ostensible partner, — it is insisted that other evidence presented on the part of defendant authorized a submission to the jury of the question whether he was a dormant partner.

The evidence relied on, in support of such position, was: 1. That it was said at the time of the formation of the partnership that it should not be made public — "should not be talked about at all." 2. The testimony of a number of witnesses residing in that locality, some of whom had had dealings with the firm of Blood & Co., to the effect that they did not know that Harris was a partner.

This evidence, it is asserted, tended to show that his relation to the firm of Blood & Co. was not generally known. It may be observed, in passing, that one of the Bloods denied that there was any understanding, at the formation of the partnership, that the fact of Harris' membership should not be talked about, and evidence was adduced, on the part of the plaintiff, for the purpose of showing that it was quite generally known in the community that Harris was a member of the firm. For the purpose of this review, however, the plaintiff's answering evidence cannot be considered, as we are to determine whether the defendant's evidence was of such a character as to authorize a jury to find that he was a dormant partner, notwithstanding the facts

which, if standing alone, we have asserted require a holding that he was in law an ostensible partner.

The agreement of partnership was reduced to writing. It does not in any manner suggest that the membership of Harris was to be kept from the public. It purports to embrace the entire agreement, and the defendant has not attempted to show that in reducing the agreement of the parties to writing anything was omitted by mistake or otherwise which had been agreed upon. It is not asserted that this so-called understanding was made a part of the original contract. It is not pretended that the parties made a subsequent agreement founded upon a new consideration. It does not clearly appear that the matter was spoken of in the presence of all the parties, much less assented to, for Samuel N. Blood says he does not remember any such thing, and was not a party to any such agreement, and Harris' evidence does not necessarily include him. Harris' testimony on the subject, and the whole of it is comprised in an answer to a single question. "Q. Now you may tell me, at the time you entered into this partnership, was anything said between you as to whether this should be made public? A. There was, sir; it was not to be talked about at all." It is, we think, clear that this evidence cannot be permitted to effect a change in the legal relation which the parties assumed in writing and by subsequent conduct.

Neither can a general partner who, in order to relieve himself from a liability which attaches to an ostensible partner, assumes the burden of proving that he was a dormant partner, be deemed to have so well borne it as to destroy the legal effect of acts of the character disclosed by this record, by the testimony of his neighbors and others given years after the dissolution, to the effect that they did not know until after the happening of that event that he was ever a member of the firm, supplemented by the expression of his own opinion that not one in ten in his vicinity knew of it. The question is not whether one knew it, or nearly all, but whether by agreement — the adoption of a firm name — and subsequent conduct he so held out the Bloods as the only members of the partnership as to prevent his name from contributing to the credit and standing of the firm. If he did not, then he must be visited with the legal consequences of his failure to give notice to those who had, prior to his withdrawal, transacted business with the firm, and the lack of information on the part of some or many persons will not operate to shield him from it.

The plaintiff, it seems, did not know that Harris was a member of the firm, but that fact cannot avail the defendant, because, at the time of the commencement of the dealings with the plaintiff, he was "an ostensible and not a secret partner, and was such as to all persons dealing with the firm, and his liability to the plaintiff is not changed by the fact that the plaintiff did not know that he was a partner. He trusted the co-partnership, whoever the partners might be who composed it." Howell *v.* Adams, 68 N. Y. 314.

This position is not only supported by authority, but is well founded in the methods largely adopted in business circles for the purpose of ascertaining whether credit shall be given. The competition in business, and the rapidity with which orders must be filled, make it necessary for business houses to promptly ascertain whether credit shall be given. This necessity has contributed to the establishment of agencies which undertake to ascertain the financial condition of corporations, firms, and individuals engaged in business. The inquiry addressed naturally is, what is the financial condition of Jones & Co.? For, having no acquaintance with the individuals comprising the firm, information as to membership does not aid the inquirer. So in this case, the plaintiff's president testified that no inquiry was made as "to who constituted the firm of Blood & Co. . . . We thought the credit of Blood & Co., when we first commenced dealing with them, was good; we inquired, and ascertained that the credit of the firm was good."

The judgment should be reversed.

All concur with PARKER, J., except HAIGHT, J., dissenting, and FOLLETT, CH. J., not sitting.

Judgment reversed.[1]

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§ 2. SEPARATE CREDITORS AT LAW.

EIGHTH NAT. BANK *v.* FITCH.

49 N. Y. 539. 1872.

ACTION for a false return by a sheriff. From a judgment in favor of defendant entered on the report of a referee, and affirmed at general term, the plaintiff appealed to this court.

N. C. Moak, for the appellant.

Samuel Hand, for the respondent.

GROVER, J. In addition to proving the return of *nulla bona* upon the execution, to entitle the plaintiff to recover, it was necessary for him to prove that the execution debtors had property out of which the execution, or some part thereof, might have been collected. The execution was against two of three partners. There was no proof tending to show that either of them had any property subject to levy except the interest in the partnership stock of goods, amounting to about $6,000. The execution was received by the defendant for collection on the 27th of February, 1867, and a levy made upon the interest of the debtors in the stock on the 28th. This was sufficient *prima facie* to establish a right of recovery. In answer to this case the defendant proved that, in March thereafter, several attachments against all the members

[1] The statement of facts has been abridged, and the dissenting opinion is omitted.

of the firm were placed in his hands for service; that he levied the same upon the stock, and that thereafter judgments were recovered and executions issued against all the partners to the defendant for collection, to an amount much larger than the value of the goods of the firm, which the defendant sold and applied upon the last mentioned executions. The first inquiry is whether this is a defence to the case made by the plaintiff. No question is made as to the right of a sheriff to return an execution unsatisfied when all the property liable thereto is incumbered by prior liens to an amount greater than its value. All the property subject to the execution in the present case was the interest of the debtors in the property of the partnership. This interest was subject to levy and sale upon the execution. Smith *v.* Orser, 42 N. Y. 132. But the title acquired by the purchaser would not be any absolute interest in the property; the remaining partners having a right to have the whole applied, if necessary, to the payment of the debts of the firm. Walsh *v.* Adams, 3 Denio, 125; Scrugham *v.* Carter, 12 Wend. 131, and cases cited; Story on Partnership, § 97. The right of the plaintiff, under his execution, was subordinated to the right of the other partner, and also to those of the firm creditors, to have the property applied in payment of the partnership debts, if necessary for that purpose. When the attachments and executions against all the members of the firm came to the hands of the sheriff, and the attachments had been levied, they constituted liens upon the property prior to that of the plaintiffs against two of the members of the firm, although the latter was first received and levied. Coover's Appeal, 29 Pa. St. 14. The sheriff was therefore right in applying the proceeds of the sale upon executions against the firm. But it was insisted by the counsel for the appellant that it was the duty of the sheriff to sell the interest of the execution debtors upon the plaintiff's execution; and that for the breach of his duty the plaintiff had a right to recover. There are two answers to this. 1st. He received the attachments and executions against the firm within sixty days after the receipt of the plaintiff's execution. These constituting liens upon the entire property, and it being the duty of the sheriff to sell the property absolutely thereon, and the liens exhausting the whole, there was nothing remaining to sell upon the execution of the plaintiff. Had it become the absolute duty to sell upon the plaintiff's execution before the receipt of the process against the firm, the case might have been different; as, had the property been sold upon the plaintiff's execution prior to that time, the interest of the execution debtors would have passed to the purchaser, subject, nevertheless, to the rights of the firm creditors to its application to the payment of the debts of the partnership. 2d. The entire property being insufficient to satisfy the prior liens, the plaintiff sustained no injury by a failure to sell the interest of the debtors upon his execution, unless such a sale would have produced something to apply thereon. The referee found as a fact, in substance, that it would not have produced anything. It is insisted

by the counsel for the appellant that this finding was wholly unsupported by evidence. The fact that the firm sold $1,000 of the goods after the levy of the plaintiff's execution, before the process against the firm came to the hands of the sheriff, the proceeds of which were retained by them, has no bearing, except that this amount must be included in the assets of the firm in determining whether there would have been any interest remaining to the purchaser of the goods at a sale upon the plaintiff's execution, after payment of the partnership debts from the assets of the firm, for the reason that the prior liens would much more than absorb this, together with the property remaining unsold. The mode of determining whether any and what interest would have been acquired by a purchaser of the property, had it been sold under the plaintiff's execution, is to take an account in equity of the other assets and of the debts of the firm, and in case the firm debts are paid from the other assets, the purchaser would be entitled to the execution debtor's proportion of the property purchased, as in what should remain after payment of such debts. The counsel for the appellant insists that the unconflicting evidence proved that the other assets of the firm would have paid the firm debts, leaving sufficient of the stock of goods, if sold under the execution, to pay the whole or some part of the execution. The answer to this is that it was not so proved. The assets consisted largely of debts, either notes or accounts (the evidence does not show which) due the firm; that two years had elapsed, during which efforts had been made for the collection of the debts, during which about three-fifths only had been realized. Under such circumstances there is no presumption that the residue of the debts were of any particular value; much less, that they were all good and collectible. Such presumption would be contrary to nearly universal experience in such cases. While it is held in some cases that the presumption is that a debtor is solvent, yet it ceases when the debt is long past due, and unavailing efforts for its collection have been made. The defendant having shown that the prior liens were sufficient to exhaust all the property subject to levy, including the thousand dollars sold by the partnership, the *onus* was upon the plaintiff to show that it sustained injury by such sale. This it failed in doing. The counsel insists that he was entitled to recover for the reason that it appeared that all the partners were liable for the payment of the debt upon which the judgment was recovered. The answer to this is that he had taken judgment against two only, not as jointly indebted with the third partner, but as his only debtors. It is entirely clear that, under this judgment, he could not interfere with the property of the third person, though liable for the payment of the debt. In any view, the plaintiff failed to show any right of recovery. It being the duty of the sheriff to sell the property upon the executions against all the partners, which were more than sufficient to absorb all the property, including that sold by the partners, and there being no proof of a surplus applicable to the plaintiff's debt,

in case none had been so sold, the plaintiff sustained no injury by the acts of the defendant under its execution. The judgment must be affirmed, with costs.

All concur, except CHURCH, CH. J., not voting.

Judgment affirmed.

JOHNSON *v.* WINGFIELD ET AL.

42 S. W. (Tenn.) 203. 1897.

BARTON, J. This cause is before us on bill and demurrer. The demurrer was sustained and the bill dismissed. Complainant appealed, and assigns errors. The main question presented in the case is whether in this State specific property belonging to the firm is subject to levy for the individual debt of one of the members of the firm. The case made in the bill substantially is as follows: The complainant shows and avers that he had obtained before a justice of the peace in Hamilton County two judgments against the defendant Wingfield, on which executions had been issued and certified, in pursuance of section 3786 of the Code of Tennessee, to Hamblen County, where executions had been issued, which were placed in the hands of a constable, and by him, on the 2d day of January, 1896, levied on the interest of Nisbet Wingfield in a lot of iron pipe and other material, the property of the firm of J. N. Hazelhurst & Co., a firm composed of J. N. Hazelhurst and Nisbet Wingfield, in which firm, it is alleged, Hazelhurst and Wingfield were equal partners. It is further alleged that the interest so levied on in the partnership property was advertised and sold according to law by the constable making the levy at public sale in the city of Morristown, on the 5th of January, 1896. It is further charged that J. N. Hazelhurst and Wingfield continued as partners, under the firm name of Hazelhurst & Co., until January 7, 1896, when the firm dissolved; upon what terms and conditions, complainant does not know, but it is charged that there was no partnership settlement had between the partners, and that the purpose and object of the dissolution of the partnership was to embarrass and defeat the collection of complainant's execution. It is further charged that on January 7, 1896, a new partnership was organized, under the old firm name of J. N. Hazelhurst & Co., composed of J. N. Hazelhurst and D. R. H. Plant, and that this firm was engaged in the completion of the waterworks for the city of Morristown, under the contract made for that purpose by the old company. It is charged that, after the sale was made, the statement was made by one of the attorneys of Hazelhurst, a member of both firms, who had been present and made a bid at the sale of the property, that Wingfield was no longer a member of the firm, and had no interest in any other property which belonged to the old firm of Hazelhurst & Co. It charged that the new firm, composed of Hazelhurst and Plant, had full knowledge of the com-

plainant's levies; that the property levied on was reasonably worth in the market, at the time of the levy, $3,000; and that Wingfield's interest in the property was at the time of the sale and purchase by the complainant, who was the purchaser at the execution sale, reasonably worth $1,500; that complainant notified Hazelhurst & Co. not to move or interfere with the pipe until his interest was paid for; that Hazelhurst & Co. disregarded the notice and complainant's rights in the property, and converted the same to their use, in the construction of the waterworks, a few days after complainant had purchased Wingfield's interest in the partnership property; that complainant was damaged by the conversion fully $1,500. It is further shown that the new members of the firm of Hazelhurst & Co. were non-residents; that they had a fund coming to them in the First National Bank of Morristown, against which an attachment was prayed and issued. The prayer of the bill is that a partnership account be had and stated between the defendant J. N. Hazelhurst and Nisbet Wingfield, so as to ascertain what interest Wingfield had in the partnership property described in the levies, and the value of that interest at the time the levies were made, at the time of the sale, and also at the time when the property was converted by J. N. Hazelhurst & Co., and for a decree against J. N. Hazelhurst & Co. and R. H. Plant, or the new firm of Hazelhurst & Co., for the amount so found, and for general relief. It is also shown in the bill that the old firm of Hazelhurst & Co. had other property at the time of the levies besides that levied on, it appearing that certain property was levied on belonging to the firm, and that was released, and levy made on other property. The proceedings before the justice of the peace, the executions, and the return of the officer, are made exhibits to the bill.

The officer's return, in substance, is that he levied on all the right, title, and interest which Nisbet Wingfield, as member of the firm of J. N. Hazelhurst & Co., had in the following personal property, situated and being in Morristown, Tenn., on the Southern Railway's side track, to wit, 25 iron fire plugs, etc., described in the paper. Both executions also show due sale of the property after advertising, the property in each instance being bid in by the complainant, Johnson, for $15.

The defendants filed a demurrer and answer, the demurrer being incorporated in the answer; the substance and point of demurrer being that a levy cannot be made on a certain, specific part of partnership property for the individual debt of one of the members of the firm, as the bill shows was done in this case, and that, to reach a partner's interest in partnership property, the levy must be made upon all the partnership property. The point is made that the partnership owned as an entirety the particular assets of the partnership, and had a right to use the same in the business of the partnership; that the purchaser would be required simply to take the interest of the debtor partner, and would have no right to maintain this bill for trover or conversion of the specific property levied on. The answer filed denies that the interest of Wingfield at the time of the levy amounted to anything, and asserts

there was an excess of liabilities at that time over assets. As stated, the demurrer was sustained and the bill was dismissed. . . .

The main question presented has been before our Supreme Court in a number of cases, and the subject seems to be surrounded by many perplexities. One of the earlier and the leading case in this State on the subject is that of Haskins *v.* Everett, 4 Sneed, 531. This was an action of replevin brought by Haskins & Reynolds against James Everett, to recover certain personal property belonging to the firm of Haskins & Reynolds, which had been levied on by an execution in the hands of a constable, issued on a judgment recovered by one Browden against Haskins for his individual debt. Judge Caruthers, in his opinion, stated that the question was whether partnership property can be taken in execution and sold for the private debt of one of the members. The circuit judge held that it could, and gave judgment for the value of the property, and also for $43, damages for the detention of the property which had been taken in the action, against the complainants, Haskins & Reynolds; and this judgment was affirmed by the Supreme Court. Judge Caruthers, in his opinion, says: "Whatever doubts and difficulties may have existed on this subject, the law is now well settled that partnership property may be seized and the interest of one partner sold for his individual debt. The purchaser, however, only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, and not his proportion of the property sold. What that interest is cannot generally be ascertained until a final adjustment and settlement of the partnership concerns. The effect of the sale and purchase is only to place the purchaser in the shoes of the partner whose interest he buys, and make him a tenant in common with the other partners. This is a necessary consequence of the rule that each partner has a lien upon the firm property, as well for the debts due by the firm as his own share and proportion thereof. The judgment creditor or the purchaser under him must take the interest sold subject to all such liens and claims. To ascertain the interest sold, the purchaser or any of the other partners may file a bill for the settlement of the partnership. The great uncertainty of the value of the interest purchased (for it may be nothing, or more or less than the amount bid) does not affect the principle." In this case it will be noted that the Supreme Court gave judgment against the firm for $43, damages for the retention of the property belonging to the firm. While it is not specifically stated that the property levied on was only a part of the property belonging to the firm, we think it sufficiently appears that it was certain, specific property.

In the case of Saunders *v.* Bartlett, 12 Heisk. 317, a bale of cotton, which was held to be the property of Joyner & Son, had been levied on by an attachment at the suit of Rolfe Saunders, for a debt of Rodney Joyner, Jr., the second member of the firm of Joyner & Son. It was sought to be replevied by Bartlett, Gould, & Heath, to whom the property had been consigned. The decision was against the plaintiffs in

the replevin suit. But two grounds were stated for the decision in the opinion: First. That there was no right of action in the complainant, because the property was held to be the property of Joyner & Son. Second. Judge Freeman said, in delivering the opinion: "Assuming that the owners were partners, it presents the question whether the sheriff can levy an attachment against one of the partners on the property of the firm, and take possession by virtue of such levy. We think it settled in Tennessee that he may do so under an execution; but he can sell only the interest of the partner against whom the process issued. Haskins *v.* Everett, 4 Sneed, 531. The same doctrine was laid down in a case of joint ownership. Rains *v.* McNairy, 4 Humph. 358. Such seems to be the weight of authority in most of the other States of the Union, as well as in England. In fact, it would seem to follow as a matter of necessity from allowing the interest of the partner to be sold or taken at all under process against him. We therefore hold that the attachment was properly levied on the interest of Rodney Joyner, Jr., whether he was a partner or joint owner; that the sheriff was properly in possession of the cotton; and that the plaintiffs below had not the right to possession as against him."

In the case of Morrow *v.* Fossick, 3 Lea, 129, it is said the right of the creditor to seize the firm property, either by execution or attachment, for the debt of the member of the firm, and sell or appropriate the debtor partner's interest, and ordinarily to file a bill in advance to ascertain that interest, is conceded; citing Haskins *v.* Everett, 4 Sneed, 531, and 1 Story, Eq. Jur. § 677. In Bank *v.* Gray, 12 Lea, 459, the case, as shown by the opinion, was substantially that there were two firms of Gray & Co., known as the old and the new, in both of which one T. J. Gray was a partner. The old firm became indebted to the bank, the complainant in the suit; and the case made in the bill was that Gray had used, in the business of the new firm, the property and funds of the old firm. Judge Freeman states that complainant has sought, based on these facts, a decree for its debts against Gray & Co., the old firm, and also the new firm, and has obtained an attachment against the new firm attaching all its effects and assets, and prays that these properties be sold, or a sufficiency to pay the bank, and the proceeds applied to the payment of the debts stated in the bill of Gray as Gray & Co., the old firm. He states this attachment and impounding of these assets has no foundation on which it could have been sustained had proper steps been taken by the defendants to defeat it. "Gray was simply the debtor of complainant, and was a partner in the new firm of Gray & Co., of which Woodard was a member. This certainly gave him no right to have the latter firm wound up without something more. A levy on the interest of one party in a partnership, either of an execution or an attachment levied on such interest, would be the basis on which such relief could be asked, in order that the creditor might have the interest of his debtor ascertained and applied, he having a fixed lien on the same by process." "But we know of no principle on

which a simple creditor at large of a member of the firm has such a right."

In the case of Boro *v.* Harris, 13 Lea, 47, Judge Cooper, delivering the opinion of the court, said: "All that an individual creditor of either one of the partners could reach by the levy of an execution, or which a purchaser could acquire under an execution sale, would be the interest of that partner dependent upon a partnership account. Haskins *v.* Everett, 4 Sneed, 531. And, if the ostensible partners had in fact no interest in the partnership property, the creditor or purchaser, if there were nothing else in the case, would take nothing." There would appear to be in these cases some confusion of principle.

The confusion and perplexity in which this question is involved is not confined to our own State, but is found in the annunciations of the text writers on this subject, and in the decisions of nearly all of the courts of last resort of the United States and in England. Mr. Freeman, in his work on Executions (2d ed. § 125), in treating of the matter, says: "It is universally conceded that, except where some statutory provision to the contrary has been enacted, the interest of the partner is liable to an execution for his individual debts. . . . Confessedly, a sale under an execution against one partner does not devest the title of the partnership in the property. It transfers only such interest as remains in the judgment debtor upon the settlement and adjustment of the affairs of the partnership. As the rights of the partnership are paramount, it would seem that they would preclude the officer serving the writ from taking the property into his exclusive possession, even for the purposes of levy and sale. And this view has been maintained with great force in several decisions pronounced in the Supreme Court of New Hampshire. The authorities elsewhere are almost unanimous in affirming that the officer may, in levying on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale. It is also undoubted that the interest subject to execution is, at least in equity, in no respect greater than that held by the defendant; that it is subject to the paramount claims against the partnership, and is in fact nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged. Whether the levy can be upon any specific part of the goods of the firm, and whether, by the sale, the purchaser acquires any interest in the property sold, beyond the right to call for an accounting, are questions upon which the authorities are not agreed. The earlier cases were determined when partnerships were regarded as mere co-tenancies. Hence those cases, and such modern cases as have been controlled by them, place sales under execution for the separate debt of a co-partner very much on the same ground as a sale for a separate debt of a co-tenant. Therefore, according to this view, an officer can, under such an execution, levy upon a part as well as upon the whole of the chattels of the firm; and it can, by his sale, transfer a moiety of the legal title, together with the right to take and

hold possession against the other partners, leaving them without any other means of enforcing the rights of the partnership than by proceedings in chancery. But the courts have gradually progressed towards a realization of the true nature of partnerships, and have therefore come to understand that they are materially different from co-tenancies. A co-partner has no right to any specific chattel belonging to the firm, nor has he any right as against the firm to take or hold exclusive possession of any such chattel. The real ownership of all the chattels is vested in the firm. The interest of each partner is merely a right to share in the proceeds of these chattels after all the partnership obligations have been satisfied. Upon what principle can the purchaser at an execution sale be sustained in the exercise of rights to which the defendant was never entitled? Clearly, upon no principle whatever. The precedents made at an early day, when the law of partnership was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions destined to grow in favor and in number, declaring that the creditor of an individual partner cannot sell any specific article, but only the partner's interest in the whole of the partnership assets, and that the purchaser does not acquire the right to hold possession of the property purchased as against the other member of the firm, but only an interest in the proceeds, after the business of the firm shall have been settled. Though the right of the officer to seize the property of the partnership under an execution against one of its members is conceded, it must be exercised, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the *corpus* of the property is merely incidental to the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently, if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, and dispose of it, as when, instead of selling the interest of the debtor partner, he undertakes to sell the entire property, though his act is nugatory, such interference renders him liable as a trespasser *ab initio*." In the same authority (section 254) it is said: "Taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale. The levy and sale must be consistent with the defendant's interest. If the levy or sale purports to be upon an estate in severalty, this is an invasion of the rights of the co-tenants, who are not parties to the writ, for which they may sustain an action against the officer making it. When the defendant is a member of a co-partnership, the duty of the officer must be ascertained from examining the decisions of his own State. The majority of the decisions on this subject are based on the false assumption that a co-partnership is a co-tenancy, and therefore sustains the officer in taking exclusive possession of the partnership property under a writ against one member alone. [Citing, among other cases,

as authority for this statement, the case of Haskins *v.* Everett, 4 Sneed, 531.] The minority, based on more correct perceptions of the nature of a co-partnership and the rights of its respective members, will not permit a writ against one member to be used to seize all the assets and to suspend the business of the firm. The law with respect to the levy of a writ on a partner's interest in firm property involves many perplexities, the solution of which is worthy of legislative aid. To deny the right to make such a levy may very seriously embarrass creditors of a debtor amply able to discharge their debt; while to admit the right may involve the co-partners, and perhaps the creditors of the firm, in very serious inconvenience and substantial loss. Where the levy is permitted, its ultimate effect is to confer on the purchaser thereunder nothing beyond the right to an accounting. This is all the judgment debtor has, and therefore all he can transfer, whether the transfer be voluntary or involuntary. Specific chattels constituting a part of the assets cannot in several of the States be seized and sold under a writ against one of the partners. In other States, the seizure of either a part or the whole of the chattels of a co-partnership under a writ against one of its members, and the exclusion of its co-partners from their possession, are unauthorized, and warrant an action of trespass against the officer. But in the majority of the States the right and duty of an officer acting under a writ against a co-partner are the same as when acting under a writ against a co-tenant. He may seize any of the property in which the defendant has an interest; may retain possession until the sale; and may then deliver possession to the purchaser, who, in a qualified sense, becomes a co-tenant with the co-partners who were not parties to the writ. Whether the latter are entitled to resume possession in the event that the property is needed in liquidating the partnership liabilities, or for other partnership purposes, and, if so, by what remedies their rights may be enforced, are unsolved judicial problems. Though, by the laws of the State in which the officer is acting, he may take exclusive possession of property under a writ against one of its owners, he must confine his levy and sale to the interest of the defendant. If he assumes to levy upon or to sell the whole property, his act, as against the partners or co-tenants not named in the writ, is wrongful. They may regard him as a trespasser upon their rights, or as guilty of an unlawful conversion of their property. He may be sued for trespass or conversion, as the injured co-tenants may elect."

Mr. Parsons, in his work on Principles of Partnership, also discusses these questions, points out the confusion, and says, among other things (section 104): "It is needless to state that a system cannot be coherent while the fundamental principle upon which it rests remains unsettled. . . . An attachment by a separate creditor is sustained upon the ground that the sheriff could seize the firm stock, and sell a partner's interest, which would be treated as a moiety. This is according to the theory of a tenancy in common, or holding by several titles with joint possession, which would be severed by execution, and the pur-

chaser vested with defendant's title and possession. This practice is unsound. 'The sheriff can, it is true, seize the firm stock in order to sell a partner's interest in it. The execution *fi. fa.* required a tenable thing for it to operate from; but, the requirement of the writ being satisfied, the sheriff must not disturb or remove the stock, and can sell only the partner's interest in it. The purchaser acquires no right to immediate possession, but merely a claim to the balance, if any is coming to the partner, to be ascertained by an account."

In 17 Am. & Eng. Enc. Law, p. 1336, we find it stated: "The interest of one partner in the partnership property may be attached or taken and sold on execution for his separate debt; but only that portion of the partnership property which belongs to the debtor partner, after paying the debts due to the firm and his own indebtedness to the firm, can be sold. The duty of the sheriff is to attach or levy upon the whole of the partnership effects, or so much of them as may be requisite to satisfy his process [citing in note 3, for this statement, cases from Alabama, Illinois, Indiana, Louisiana, Mississippi, New York, Pennsylvania, Texas, Virginia, and California], though some of the States permit a levy on specific property less than the whole [citing, as authority for this statement, cases from Kansas, Louisiana, Maine, Missouri, New York, New Jersey, Ohio, and Kentucky]. The creditor acquires no legal interest in the property levied upon, and, until the interest of the debtor becomes a share in common in the buyer by means of a sale, the title is unaffected, and a purchaser from the firm would get a title unincumbered by the levy; and even a judgment against one partner is not such a lien upon the real estate of the firm as to remain an incumbrance after a sale by it. These principles apply to actions brought by a creditor of the partnership against one partner, or to an attachment or levy of execution by a partnership creditor against the individual interest of one partner, as well as to actions upon claims against an individual partner." On page 1340 of the same book we find it stated: "In order to guard against intermediate sales, and to make the levy effectual, the sheriff is, as a general rule, required to take exclusive possession of the property levied upon; such possession not being deemed adverse to the partnership, and the property in his hands being subject to partnership debts;" citing, as authority for this statement, cases from nearly every State in the Union, and among others the Tennessee cases above cited. Continuing, it is said: "In some States, however, the theory is adopted that, as the debtor partner is not entitled to exclusive possession, the sheriff is not, and that, therefore, it is sufficient to declare that there is an attachment or execution, designating the property levied upon, or otherwise, according to local practice;" citing, as authority for this statement, cases from Iowa, Louisiana, Massachusetts, Michigan, New Hampshire, New York, North Carolina, Wisconsin, and the case of Bank *v.* Carrollton R. R., 11 Wall. 624. Continuing, it is said: "A sale of the entire interest in the property, or any specific part of it, as distinguished from the

interest of the debtor partner, will make the officer a trespasser *ab initio*." It is further stated on page 1343, same book: "The buyer at an execution sale acquires the same title that the debtor partner had, subject to the partnership debts and equities between the partners; the claim of the co-partners, or any balance found due them, being considered as a debt, in determining the debtor partner's interest. If the partnership is insolvent, or if the debtor's share is absorbed by the equities of his co-partners, the buyer gets nothing. And if the buyer sells or disposes of the whole property, and appropriates the proceeds, he is liable for conversion. That a partnership is insolvent, or that there is no surplus for the debtor partner, does not make the levy a trespass. The property sold continues liable for the joint debts, but the joint creditors have no claim upon the purchase money."

These extracts will show into what confusion this subject has fallen by reason of the early decisions in all the States, evidently based, as stated by the text writers from whom we have quoted, on an erroneous conception, or, rather, a failure to recognize the true status of partnership property. It is well settled everywhere that, as to partnership property, partners are trustees of the partnership, as to each other, and the advantages derived from it enure to the benefit of the firm. And it is undoubtedly true that a firm or its members could, by injunction, or other appropriate remedy, prevent a partner from diverting partnership property to his individual use, to the damage of the firm, and could prevent him from exercising rights of possession and control which would be destructive of the purposes, or an injury to the business, of the firm. It is also well settled, as a general rule, that an execution cannot reach any higher interest in property than the debtor himself has; and yet all these decisions which justify an officer in taking exclusive possession of firm property would seem to ignore these just principles, which are so absolutely necessary to the successful operation of partnership business. It would seem to be a contradiction of terms and principles to hold that the officer only takes and the purchaser only gets the interest which a partner may have in partnership property after a firm has been wound up and liquidated, and the partner's ultimate interest thus ascertained, and that an officer may seize partnership property, and retain exclusive possession of it until the sale, he thus being enabled to do what the individual partner would have no right to do. And it also seems a violation of fundamental rights, and the taking of private property without compensation, to hold, as we understand was held in the case of Haskins *v.* Everett, *supra*, that where a partnership has endeavored to assert its rights of possession by a replevin suit as against an officer who had levied on the property for the individual debt of one of its members, it would be liable for damages for the use and detention of its own property. It would seem that many perplexing questions might arise out of this holding. Suppose different executions were levied on different articles or lots of personal property belonging to a partnership for the individ-

ual debt of a member of the firm, and on an accounting and liquidation it was ascertained that the interest of the debtor partner was only sufficient to pay one of the claims; what claim would have priority? It seems to be clear that, as long as property has not been converted by a partner, and is being used, or subject to be used, for the legitimate purposes of the partnership, no partner has any certain or exclusive or special interest in any specific partnership property, but it is the property of the entity, the firm. How, then, can a creditor or an officer take any specific interest in any particular piece of property belonging to the firm under such an execution, levy, and sale? Let us suppose that a creditor having a debt amounting in the aggregate to about $500, as in this case, levies on partnership property worth $3,000, and another creditor having a debt of $1,500, levies at a subsequent time on another article of partnership property worth $1,500. On an accounting it is ascertained that the debtor partner's interest in the firm at the time of the levies amounted to $1,500. The property worth $3,000 was sold, and bid in by the execution creditor, at $500, in satisfaction of the first debt mentioned. What will be the result? At the time of the first levy, if the debtor partner is to be charged with one-half the property levied on, as taken out in his interest, it would absorb all his interest in the firm. In other words, does the levy on specific property appropriate any specific property, or only the debtor's interest in the firm? It would seem that by far the more sensible and enlightened method of reaching a partner's interest in the firm would be by garnishment, as provided by statute in Georgia; and, as said in Freem. Ex'ns, it would seem to be a subject deserving of legislative attention.

The hardship that might result from carrying out the rule laid down in this State in the cases in 4 Sneed, 531, and 12 Heisk. 317, could be well illustrated by this case, where the firm had a contract to build an extensive system of waterworks. A part of the material necessary to the completion of the contract was levied on and sold by an officer for the individual debt of one of the members, and it is stated in the bill that the purchaser, the complainant in this case, notified the other partner that he must not move or do anything with this property until his interest was paid for. It seems that this partner paid no attention to this direction; and it would clearly appear that, if the complainant had had it in his power to enforce the directions given by him, it would not only have resulted in great damage and ruin to the firm's business, but also to the other partner, who was in no way to blame for Wingfield's indebtedness. But, whatever trouble may arise from these holdings, we do not feel at liberty, in this court, to depart from what we understand to be well-settled principles in this State. Nor do we wish to be understood as criticising the holdings of our Supreme Court upon this subject, further than to call attention to the seeming inconsistencies that arise therefrom, and which are common to all the earlier cases in almost every State in the Union, as well as in England. But, for the purposes of this case, we may state that we understand the decisions in this State

from which we have above quoted to settle the following points: (1) That partnership property may be levied on by the creditor for the individual debt of a member of the firm. (2) That specific property may be levied on, and it is not necessary that the execution be levied upon all the property of the firm. (3) That the officer may, and that in fact it is his duty to, take actual possession of the property levied on, and to retain it until the sale is made. (4) That the purchaser only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, as is the language used in the case of Haskins *v.* Everett, *supra*, or a mere right to an accounting, as stated in another case. (5) That, as stated by Judge Freeman in Bank *v.* Gray, 12 Lea, 459, a levy is necessary in order to fix a lien so as to authorize the filing of a bill.

These points being settled, it results, in our opinion, that the chancellor was in error in dismissing the complainant's bill. While we think that Hazelhurst had the right to use and properly, whether by himself, or by the new firm of Hazelhurst & Co., used the iron which had been levied on, in carrying out the contract and business of the old firm, still it is the logical effect of the decisions which we have quoted that the creditor, Johnson, having the right to have the property levied on, by the sale and purchase took whatever interest Wingfield had in this property at that time, which could only be ascertained by an accounting, and that this he has a right to do. If it shall turn out on an accounting that at the time of the levy the liabilities of the firm, as claimed in the answer filed with the demurrer, exceeded the assets, and that the firm was insolvent, then Johnson will, of course, take nothing by his purchase; and it is also clear that Johnson's interest could not exceed the value of Wingfield's share in all the partnership assets after all partnership debts were paid, and all charges against him in favor of Hazelhurst were settled. The logical result of our cases on this subject seems to be that the taking by the officer has practically the same effect as the withdrawal and conversion of that amount of property by the debtor member of the firm, subject to being compelled to return such an amount of the property after the exhaustion of other partnership property as might be necessary to pay all partnership debts, and to secure to the other partner his just share and division of the partnership assets. For these reasons the decree of the chancellor will be reversed, and the cause remanded to be further proceeded with, with directions to refer the cause to the master to take an account, and to ascertain and report the condition of the old firm of Hazelhurst & Co. at the time of the levies made, as shown in the bill; and the complainant will be entitled to a decree for the value of Wingfield's interest in the property levied on, if any, on the lines indicated in this opinion. The decree of the chancellor is reversed, the demurrer overruled, and the cause remanded, as stated, and the defendants will pay the costs of the appeal.[1]

[1] Affirmed orally by Supreme Court, October 16, 1897.

MICHALOVER *v.* MOSES.

19 App. Div. (N. Y. Sup. Ct.) 343. 1897.

WILLIAMS, J. The action was for conversion. The personal property belonged to the plaintiff and one Rines as co-partners, who were equally interested therein.

The defendant, a marshal of the city of New York, under an execution against Rines individually, took and sold the whole property and not *merely* Rines' interest therein. This constituted a conversion of the plaintiff's interest in the property. While the defendant might have taken and sold the undivided interest of Rines, and in that event might have delivered the whole property to the purchaser, yet the purchaser would have acquired title to only the interest of Rines, which would have been the undivided one-half, subject to the claims of creditors of the partnership, and he would have been obliged to account to the creditors and the plaintiff for their interest therein, the same as Rines himself would. When, however, the defendant took and sold the entire property, as the individual property of Rines, he was guilty of a conversion of plaintiff's interest therein. Walsh *v.* Adams, 3 Den. 125; Waddell *v.* Cook, 2 Hill, 47; Zoller *v.* Grant, 56 N. Y. Super. Ct. 279; Berry *v.* Kelly, 4 Robt. 106; Bates *v.* James, 3 Duer, 45; Atkins *v.* Saxton, 77 N. Y. 195.

Sections 1413 and 1414 of the Code of Civil Procedure recognize this rule of law, and provide for cases wherein levies may have been made upon the interest of partners in the property of the co-partnership by virtue of executions against individual co-partners. Read *v.* McLanahan, 47 N. Y. Super. Ct. 275.

There can be no doubt as to the plaintiff's right to recover in this form of action. The theory of the right of action is that the defendant, by such seizure and sale of the *whole* property, is guilty of such interference with the plaintiff's rights as constitutes a conversion of his, plaintiff's, interest in the property.

The judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN, and INGRAHAM, JJ., concurred.

HOLMES *v.* MILLER ET AL.

41 S. W. (Ky.) 432. 1897.

PAYNTER, J. The appellant, Sue Holmes, obtained a judgment against appellee, H. E. Miller. Execution was issued on it, and levied on the interest of H. E. Miller in a sawmill, lumber, etc., as the joint property of H. E. Miller, W. H. Miller, and Robert Miller. The execution was returned with proper indorsement on it, as required

by section 660, Civ. Code Prac. This action was instituted to subject H. E. Miller's interest in the property upon which the execution was levied to the payment of the judgment.

H. E. Miller, W. H. Miller, and Robert Miller were partners, doing business under the firm name of H. E. Miller & Sons. The judgment was against H. E. Miller for an individual debt. The assets of the firm were first bound for the partnership liabilities. It appears, from the evidence in this case and the report of the master commissioner, that the partnership liabilities exceeded the value of the assets of the firm. It follows that H. E. Miller had no interest in the partnership assets which could be subjected to the payment of the Holmes debt, and the court properly so adjudged. The court had previously entered a judgment to the effect that H. E. Miller's interest in the firm should be subjected to the payment of the judgment, but subsequently set aside the judgment. It is unnecessary to determine whether the court had or did not have the authority to set it aside. It is sufficient to say that the court proceeded to ascertain the interest of H. E. Miller in the property, the value of the firm's assets, and its liabilities. None of the creditors of the firm were parties to the proceeding at the time the judgment in question was entered, and could not have been prejudiced by it. The court had the authority to, and it was its duty to, proceed to ascertain the facts which demonstrated that the first judgment was not effective, because Miller had no interest in the property upon which the execution was levied that could be subjected to the payment of the judgment.

The judgment is affirmed.

WILLIS *v.* HENDERSON.

43 Ga. 325. 1871.

HENDERSON'S *fi. fa.* against P. B. Jones was levied on certain lots of land as the property of P. B. Jones. Jones filed an affidavit that the lands were not his, individually, but belonged to him and John F. Jones, as partners in farming, and also filed a claim to the land for the partnership. Thereupon the sheriff suspended proceedings, and returned the affidavit of illegality and claim to court. Henderson ruled the sheriff for the money due on his *fi. fa.* The sheriff responded the facts aforesaid as his reason for not having the money. Henderson's attorney demurred to said answer, and the court made the rule against the sheriff absolute. That is assigned as error.

Richard Sims, for plaintiff in error.

H. Fielder, for defendant.

McCAY, J. Without doubt, by the common law, it was competent to levy upon and sell the interest of a partner in any property belong-

ing to the partnership. Shaw *v.* McDonald, 21 Ga. 395. The purchaser got the interest of the partner; he did not get an undivided title equal to the partner's share in the concern, according to the agreement, but the interest of the partner after a settlement of the concern affairs. 24 Ga. 625. Evidently this was a very clumsy and often a very unjust mode of enforcing the claims of a creditor against one of the firm. The purchaser did not know what he was buying, since his interest depended altogether upon the result of a settlement of the firm affairs.

Our Code, section 1908, prohibits the sale of effects so situated, and provides that the interest of a partner in the partnership assets may be reached by the process of garnishment. And this, we think, is far better for both parties. The proceeding is in the usual way, by affidavit, bond, and summons, as in other cases, with, perhaps, the qualification that it would be incompetent to get a judgment against the firm by a service of only the party whose interest is sought. A full investigation may be had, and if the defendant in the judgment has any interest after settlement of the affairs, a judgment will go against the firm.

2. We see no reason why the defendant may not stop the execution in the way adopted. If the facts stated be true, the execution is proceeding illegally, since it is levying on an interest of the defendant not subject to levy and sale. If they be untrue, and the property is the property of the defendant, a finding of the fact by the jury will settle the matter. We do not see, either, why the claim is not strictly proper. The claimant is not the defendant, but the partnership.

Judgment reversed.

BROWN, JANSON, & CO. *v.* HUTCHINSON & CO. ET AL.

[1895] 2 Q. B. 126.

THE facts in this case are as follows: The plaintiffs brought an action against J. A. Hutchinson and the firm of Hutchinson & Co., of which he was a member, upon a bill of exchange for £3,000, drawn by J. A. Hutchinson upon and accepted by the firm, and they obtained judgment against J. A. Hutchinson under Order XIV. for £3,034 17*s.*, leave being granted to the firm to defend the action, on the ground that J. A. Hutchinson had no authority to accept the bill for the firm.

The plaintiffs then applied by summons under § 23 of the Partnership Act, 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the judgment debt, and for the appointment of a receiver of his said partnership interest. This order was made and was affirmed by the Court of Appeal. Sub

sequently the learned judge at chambers ordered the defendants, A. Hutchinson & Co., to deliver to the plaintiffs an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendant A. Hutchinson & Co. This is the order appealed against.[1]

McCall, *Q. C.*, and *H. T. Atkinson*, for the defendants.

Witt, *Q. C.*, and *Bartley Denniss*, for the plaintiffs.

Rigby, L. J. This case depends upon § 23, sub-sec. 2, of the Partnership Act, 1890. The latter part of that sub-section provides that the court or a judge may " direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require." Reading the sub-section with § 31, sub-sec. 1, which provides that an assignment by a partner of his share in the partnership, either absolute, or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require any account of the partnership transactions, I think it plain that the intention of the legislature was that, under ordinary circumstances, in dealing with a case under sub-sec. 2 of § 23, the analogy of an assignment by a partner of his share should be adhered to. In order to get rid of such inconveniences as arose under the old law in cases where the partnership property was seized to satisfy the separate judgment debt of one of the partners, it is provided by § 33, sub-sec. 2, that a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the act for his separate debt. That provision is, of course, only applicable to English partnerships; and whether there is in this case an English partnership as well as the French partnership, or, if not, what the French law on the subject under such circumstances may be, we are not in a position to say. It seems to me that the words at the end of sub-sec. 2 must be taken as meaning that *prima facie* the judgment creditor who has obtained a charging order under that sub-section shall have such remedies as a person would have in whose favor a charge had been made by a partner upon his share in the partnership; and that by so reading them we are not depriving such a judgment creditor of any right which he would have had under the law as it previously existed. Treating that as being the general rule laid down by the sub-section, what then is the meaning of the concluding words of the sub-section, " or which the circumstances of the case may require?" I do not look upon those words as having no effective meaning. I think that they recognize that the analogy of an assignment of a share in the partnership by a partner might not in all cases afford the rule which is to be acted upon under the new law. But I cannot think that the previous words referring to the remedies given to an assignee by way of charge were inserted without reason, as would be the case accord-

[1] The statement of facts is taken from the opinion of Lopes, L. J.

ing to the wide construction of the sub-section contended for by the plaintiffs. I think they were inserted as an instruction with regard to the rule to be acted on in ordinary cases, and that the concluding words were added to give, under special circumstances, a wider jurisdiction to direct accounts than would have existed in the case of an assignee; and what the special circumstances so contemplated may be, it seems to me unnecessary for the purposes of the present case to endeavor to define, for, when I look at the facts, I cannot find any special circumstances whatever to take the case out of the ordinary rule indicated by the sub-section. I do not think that in a case like the present the legislature ever intended that an account should be directed as against the other partners during the continuance of the partnership. I therefore agree with my Brother LOPES that this appeal should be allowed. *Appeal allowed.*

IN RE ABRAHAM SANDUSKY.

17 Nat. Bankruptcy Register, 452. 1878.

THE members of the firm of H. Sanford & Co. were adjudicated bankrupts early in 1878. Prior to the adjudication, judgment creditors had levied on certain separate property of A. Sandusky, a member of the bankrupt firm. An injunction was obtained, upon the petition of the assignee in bankruptcy, of A. Sandusky and of his separate creditors, staying the enforcement of the judgment creditors' lien upon A. Sandusky's separate property.[1]

L. H. Bradley, for the petitioners.

N. M. Broadwell, for the respondents.

N. W. BRANSON, Register in Bankruptcy. The petitioners seek to maintain their injunction upon the familiar rule obtaining in equity and in bankruptcy, that the separate estate of an individual partner cannot be applied towards payment of the partnership debts until after the payment in full of his separate debts. The respondents, on the other hand, contend that the above rule does not obtain in this case, for the reason that they had obtained a specific lien on the property in question, by virtue of the levy of an execution thereon.

I have hunted up and examined the authorities on the question thus presented, with such care as my time would permit. The only case in a court of the United States which I have found in point is the case *In re* Lewis, 8 N. B. R. 546, decided by Judge Rives, of the U. S. District Court for Western District of Virginia, and affirmed on appeal by Judge Bond, of the Circuit Court. In that case the court holds that although, in the distribution of the general assets of a bankrupt, the partnership assets are to be first applied to the partnership debts, and the individual assets of any separate partner first

[1] The statement of facts has been abridged.

applied to his individual debts, according to the terms of the Bankrupt Law, yet, when a judgment has been obtained by a partnership creditor against the members of a concern, such judgment operates as a several lien against the real estate of each partner; and if prior, in point of time, to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment; but the court is further of the opinion that, when such partnership creditor can get satisfaction of any part of said judgment out of the partnership assets, the *pro rata* distribution to which such partnership creditor is entitled out of the partnership fund shall first be applied as a credit on said judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor.

In the case of Meech *v.* Allen, 17 N. Y. 300, the New York Court of Appeals say this: It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts, and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in a court of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is *equitas sequitar legem.* 1 Story, Eq. Jur. § 553. In Wilder *v.* Keeler, 3 Paige, 167, Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of creditors over another." So in the case of Averill *v.* Loucks, 6 Barb. 470, Paige, J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities." This is also conceded in the case of McCullough *v.* Dashiell, 1 Har. & Gill, 96, where the whole doctrine of distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., says: "At law the joint creditors may pursue both the joint and separate estate to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several without the possibility of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute as in case of a judgment. Chancellor Walworth, in Mower *v.* Kip, 6 Paige, 88, says: "The rule of this court is to give effect to the lien of a judgment upon a legal title so far as it can be enforced by execution at law."

I have thus quoted at large from the opinion of the New York Court of Appeals, as it is a court of high authority. To the same effect is Straus *v.* Kerngood, 21 Gratt. 584. In New Jersey it is held that the equitable principle above referred to cannot apply to creditors who have secured their debts by judgment and execution liens. 1 Stock. N. J. 336. The Supreme Court of Georgia hold that, in cases of co-partnership, the equity in favor of separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. Baker *v.* Wimple, 19 Ga. 87; Cleghorn *v.* Ins. Bank, 9 Ga. 319. In the latter case, Lumpkin, J., delivering the opinion of the court, says: "The equity in favor of separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate."

In Wisham *v.* Lippincott, 1 Stock. 353, Chancellor Williamson says: "A court of chancery may undoubtedly, where the equities between the parties are to be adjusted, and when the assets are before the court, and the court is called upon to marshal them, apply such a rule. I have no hesitation in saying that when a joint creditor of a firm has a judgment and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtors, before the partnership creditors can claim anything, to interfere with such execution, either on application of one of the partners or any creditor of the firm, or separate creditor of any of its members."

Some cases in New Hampshire would seem to announce the contrary principle, as Crockett *v.* Crain, 33 N. H. 542; Jarvis *v.* Brooks, 23 N. H. 136, and Holton *v.* Holton, 40 N. H. 77. But these cases must be considered in connection with a late decision of the same court, Bowker *v.* Smith, 48 N. H. 111; which appears to modify the doctrine announced in the earlier cases. In the latter case, Perley, C. J., in giving the opinion of the court, and speaking of the equitable doctrine relied on by the petitioner in this case, says: "The grounds on which the doctrine was admitted here afforded no reason for supposing that this right remains to be asserted after the property, once taken for the satisfaction of debts, has been finally appropriated under legal process by levy on the property of the individual partner." The Supreme Court of South Carolina holds that the private creditors of a partner are entitled to pay out of his separate estate, in preference to partnership creditors, though the latter have recovered judgment against him as surviving partner. Woddrup *v.* Ward, 3 Des. 203.

Upon consideration of all the authorities upon this point, which I have been able to find, it appears to me that there is a very decided preponderance to the effect that where an execution lien has been obtained, in good faith, before bankruptcy, on the individual prop-

erty of a member of a partnership firm, under a judgment against the firm, that that statutory lien will not yield to the equities of the separate creditors of that partner. And this is entirely in harmony with the rule which obtains in courts of bankruptcy, that liens generally, including execution liens, which have been acquired in good faith before the commencement of proceedings in bankruptcy, are preserved and enforced.

I am therefore of opinion, upon the papers submitted to me in this matter, that the injunction should be dissolved. All of which is respectfully submitted.

TREAT, J. Decision of register affirmed.

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§ 3. CREDITORS IN EQUITY.

RODGERS *v.* MERANDA ET AL.

7 Ohio St. 179. 1857.

THE original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record, that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of his individual creditors, in proportion to the amount of their respective demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities, in full. At the date of his failure and assignment, he was a partner with John W. Dever, in a mercantile firm, under the name and style of Dever & Murray; which firm had also become insolvent, and likewise Dever; and the firm had made an assignment of the partnership property and assets, about the same time to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs, the partnership creditors, although they have filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claim the right to be admitted to a participation in the dividends of the separate estate of Murray, *pari passu* with his individual creditors; while the latter deny the right, and insist that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appears further, that Murray, besides advancing his part of the capital of the firm, also loaned money to the firm to a large amount, for which he held the obligations of the firm, which obligations, by the assignment of Murray, came into the hands of the plaintiff, who has presented the same to the assignee of the firm, and claims to have the

same paid out of the assets of the firm, *pari passu* with the other partnership debts. The other creditors resist this, and plaintiff asks an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The court below sustained the demurrer, and gave judgment in favor of the defendants. And this petition in error is filed to review and reverse that judgment.

W. White, and *S. & R. Mason*, for plaintiff.

Anthony & Goode, for defendant Meranda.

Conover & Craighead, for defendants Tracy, Irwin, & Co.

Bartley, C. J. Two questions are presented for determination in this case. The first is, whether in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects; so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm; and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, *in equity*, only look to the surplus of the separate property of a partner, after the payment of his individual debts; and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund, after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given — that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility. 3 Kent, Com. 65. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively, which has been thus benefited by

their transactions. 1 Harr. & Gill Rep. 96. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm; and also, those who contract with a partner in his separate capacity, place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What then is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor, in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the very question is, whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of a partner is a rule of equality, does not still rid the subject of difficulty. For leaving the rule to stand, which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors, is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and for the purpose of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens, that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive share in the surplus of the separate estate *of each of the several partners*, after the payment of the separate creditors of each. It is a rule of equity, that where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the

prejudice of those who have a claim upon that, and no other to depend on. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it; and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them, which the separate creditors have not; they can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid eighty per cent on their debts, out of the joint fund, to come in *pari passu* with the individual creditors of one of the partners, whose separate property will not pay twenty per cent to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property. And that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results, as a principle of equity, from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but the one.

It has been argued that partnership contracts are *several* as well as *joint*, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right of partnership creditors against the separate property of individual partners *in proceedings at law*, is not in controversy. The question here relates to the *relative equitable rights* of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights of creditors in proceedings at law, with their relative rights to an equitable adjustment in marshalling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for

near a century and a half. We find it distinctly recognized in the case of *Ex parte* Crowder, 2 Vernon, 706, decided in 1715. And in *Ex parte* Cook, 2 Peere Williams, 500, Lord Chancellor King declared it settled as a rule of convenience in bankruptcy that joint creditors should be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate after paying the joint creditors, the share of each partner should be distributed to his separate creditors; and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord Hardwicke followed the same rule, in *Ex parte* Hunter, 1 Atkins, 228. But it appears that in *Ex parte* Hodgson, 2 Bro. Ch. C., decided in 1785, Lord Thurlow made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu* with the separate creditors. This ruling of Lord Thurlow appears to have had reference to proceedings at law, and in bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction on the order in bankruptcy. But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord Loughborough, in *Ex parte* Elton, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the case of Hodgson, was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order and secure the application of the separate estate to the satisfaction of the separate debts; and although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom, until the amount of his distribution in the joint fund could be ascertained, and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, puts an end to the assertion, which has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this, he said: "If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy, but *upon general equity*, that the joint estate is applicable to partnership debts, and the separate estate to the separate debts." Again, in speaking of the inconvenience of Lord Thurlow's rule, he said: "What I order here to-day, sitting in bankruptcy, I shall forbid to-morrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. *The plain rule of distri-*

bution is that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed."

Lord Eldon, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor. Chiswell *v.* Gray, 9 Ves. 126; Dutton *v.* Morrison, 17 Ves. 207. And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy, in England, is a mistake; it was long and well settled as a rule of equity, before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until the statute of 6 Geo. IV. c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the courts of the several States in this country.

In Pennsylvania the rule was discarded, by a majority of the court, in the case of Bell *v.* Newman, 5 Serg. & R. 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property; and that, then, the balance of the separate property should be divided *pro rata* among both classes of creditors. This was placed partly on the ground of equity, and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge Gibson, however, dissented, insisting forcibly on the rule adopted in England, as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case, was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice Tilghman remarked, in the opinion of the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of Sperry's Estate, 1 Ashmead, did not directly affect the question, inasmuch as it came fully within the exception, that where there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the court in that State, in Walker *v.* Eyth, 25 Pa. St. 216, where the court express the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors, and the separate estate to the separate creditors." But the question was not directly decided, the decision of the case being put upon another

ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania. 1 Am. L. Cases, 483.

In Virginia the question was presented in 1848, in the case of Morris's Adm'r *v.* Morris's Adm'r, 4 Grattan, 293, and was elaborately discussed on both sides, but the court was equally divided on the question of the adoption of the rule as a general rule of equity, and the decision of the case was put on other grounds.

In New Jersey, in the case of Wisham *v.* Lippincott, 1 Stockton's Ch. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of Bardwell *v.* Perry *et al.*, 19 Vt. 292, the rule was discarded as a principle of equity, with this qualification, that the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a *pro rata* distribution out of his separate estate.

It does not appear that the doctrine of the English courts on this subject was ever adopted as a rule of equity by the courts in Massachusetts; but it is said that a statute was enacted in that State, in 1838, providing, as a rule for the distribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors, and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of Camp *v.* Grant *et al.*, 21 Conn. 41; and also in Mississippi, in the case of Dahlgran, Adm'r, *v.* Duncan, 7 Sm. & Mars. 280; but adopted in Alabama in Bridge *v.* McCullough, 27 Ala. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom." Jackson *v.* Cornell, 1 Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor Kent, in Murray *v.* Murray, 5 John. Ch. 60, and, upon full consideration, adopted as a rule of equity, by Chancellor Walworth, in Wilder *v.* Keeler, 3 Paige, 517; Payne *v.* Matthews, 6 Paige, 19; Hutchinson *v.* Smith, 7 Id. 26.

The same doctrine was adopted by Chancellor Desaussure, in South Carolina, as early as 1811, in Woddrop *v.* Ward, 3 Des. Eq. R. 203; and also by the Supreme Court of New Hampshire, in Jarvis *v.* Brooks, 3 Foster, 136.

The subject was very fully reviewed in the Court of Appeals of Maryland, in McCulloh *v.* Dashiell's Adm'r, 1 Harr. & Gill, 96, wherein it was settled in that State that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in the distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in Murrill *et al.* v. Neill *et al.*, 8 How. 414.

It has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of equity. (After quoting from Story on Partn. §§ 365, 366, 367, and 3 Kent's Com. 65, the learned judge continued:)

It is argued, however, that this doctrine was overruled in Ohio, in the case of Grosvenor *v.* Austin, 6 Ohio, 104. It is true, that the reasoning of the court in the opinion is to that effect; but the case decided falls within one of the acknowledged exceptions to the rule. Where the partnership has become insolvent, and there are no partnership assets for distribution, and no living solvent partner, it has been uniformly conceded that the principle of the rule does not apply. The case of Grosvenor *v.* Austin was a bill in equity by the creditors of the firm of Seymour Austin & Calvin Austin, for a distributive share with the individual creditors of Seymour Austin out of the assets of his separate estate in the hands of his administrator. There were no partnership assets, and both parties had died insolvent. This was not a case, therefore, for the application of the principle under consideration. And Judge Lane, in delivering the opinion, says, as to this rule: "This court are of opinion, that if any such rule exist, it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books, except the one in 9 Vesey, and the South Carolina case, that touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel, in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy," etc. Touching the subject of this *obiter* opinion, the following remarks of the Supreme Court of the United States, in Murrill *v.* Neill, 8 How. 414, are in point:

"The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of

innovation at this day; at least, under any motive less strong than the most urgent propriety."

It has been argued that the statute in this State, relative to the equal distribution of the estates of deceased persons, and also the statute providing that all assignments of property in contemplation of insolvency, giving preferences to creditors, had established, in this State, a policy inconsistent with the rule in question. These statutes were certainly never intended to have such an effect. The equality required by them is subordinate to the settled equities and priorities of different grades and classes of creditors. It was manifestly not the design of these statutes to change the nature of partnership contracts, and abrogate the preference of partnership creditors in the distribution of the partnership assets. And as this was not done, the rule of equality, adopted in equity, requires the corresponding preference to be given to the individual creditors of each partner in his separate estate.

The remaining matter for determination, in this case, involves the inquiry, whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a *pro rata* distribution with the partnership creditors, out of the joint fund. It is claimed that the liability of the firm to a partner for money loaned is a partnership debt, and that the individual creditors of that partner are, in equity, entitled to an equal distribution therefor, out of the partnership property. On the other hand, it is claimed that as each partner is individually liable for the debts of the firm, and as no partner can be allowed to participate with his own creditors in the distribution of a fund, the separate creditors of a partner, as they can only claim through the rights of their debtor, cannot be allowed such participation with the joint creditors.

It was at one time held to be the law, on the authority of adjudications by Lord Talbot and Lord Hardwicke that if a partner has loaned money to the partnership, or the partnership has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case, the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money lent; and that, in the latter case, the partnership creditors would be entitled to payment to the same extent, out of the individual estate of the partner. *Ex parte* Hunter, 1 Atk. 223; Story on Partn. § 390. But this doctrine has long since been overruled; and the contrary appears now to be well settled. In *Ex parte* Lodge, 1 Ves. Jr. 166, Lord Thurlow held that the assignees on behalf of the joint estate could not be entitled to distribution out of the separate estate of Lodge, for money which he had abstracted from the partnership, unless he had taken it with a fraudulent intent to augment his separate estate. And in *Ex parte* Harris, 2 Ves. & B. 210, 212, Lord Eldon said: "There has long been an end of the law which prevailed in the time

of Lord Hardwicke, whose opinion appears to have been that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other, in each case. That has been put an end to, among other principles, upon this certainly, that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so, if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case no proof to affect the creditors though the individual partners may certainly have the right against each other."

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects where there are conflicting claims; and that, inasmuch as an individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership but also of himself; therefore the separate creditors of a partner could not enforce any claim to a distributive share of the joint effects against the partnership creditors, which could not have been enforced by the partner himself for his own benefit. Story on Partnership, § 390. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency, is to be received with this important limitation, that it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate estate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the Common Pleas reversed; and ordered that the separate effects of Peter Murray be distributed *pro rata* first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray; and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, for money loaned by him to the firm.

SWAN, BRINKERHOFF, SCOTT, and SUTLIFF, JJ., concurred.

HOLMES *v.* McDOWELL ET AL.[1]

15 Hun (N. Y.), 585. 1878.

WESTBROOK, J. The first of the above entitled actions was one to wind up a co-partnership, of which Henry C. Holmes and James H. McDowell had been the sole members. The object of the action was to adjust the affairs of the partnership, which was insolvent, and to divide the property equally among its creditors. The suit was commenced March 20, 1878, and on the 26th day of the same month, by stipulation between the attorneys, an order of this court was made making Henry C. Holmes the receiver of the partnership property without security and without compensation. On the 2d day of May, 1878, also by stipulation between the parties, an order was entered making Theodore A. Claxton receiver instead of Holmes, and requiring him to give a bond with one surety.

After the commencement of the first above-entitled action, and after the appointment of Holmes as receiver, the other actions were commenced. They were brought by the creditors of the firm of Holmes & McDowell, and judgments were obtained in them in due time, on which executions were duly issued and returned unsatisfied. By proceedings supplementary to execution, Theodore A. Claxton was made receiver on the 3d day of May, 1878, which was one day after he had been appointed to the same position in the suit between the partners.

The plaintiffs, in actions Nos. two, three, and four, after the appointment of the receiver in their proceedings, moved this court for an order directing him to pay their judgments. The court, at Special Term, MR. JUSTICE INGALLS presiding, ordered the receiver to execute a new bond in action number one with two sureties, and upon his so doing the motion was to be denied without costs. The new bond was executed, filed, and approved upon the same day the order was entered, and from this order the plaintiffs in the three actions, Nos. two, three, and four, appealed.

Action number one is at issue and undetermined. The firm of Holmes & McDowell is insolvent, and the other creditors of the firm have no notice of these proceedings. It is claimed by the appellants that the order of the Special Term was erroneous for two reasons. First, because the order appointing Claxton receiver in action number one was void, for the reason that his bond was required to be with only one surety; and second, because those creditors who had been diligent in the prosecution of their claims to judgment and execution, were entitled to priority. Each of these points will now be considered.

It is conceded, that the Code of Civil Procedure, § 715, requires a bond given by a receiver to be one with two sureties; but it is also

[1] The titles of the three other actions referred to in the opinion have been omitted.

true that § 730 provides that the court "may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid from the time of its execution." It is argued, however, that the vice inhered in the original order itself, and that was void because it provided for but one surety by the receiver. The error in this reasoning is, that it assumes the power exercised by the Supreme Court, in the appointment of the receiver, was derived from the statute, and that, therefore, all its directions must be implicitly followed; whereas, the right of this court to appoint a receiver in actions to wind up partnerships is as old as the jurisdiction of the Court of Chancery, to the prerogatives of which the Supreme Court succeeds. Having this general power, it follows that the mode and manner of its exercise, unless declared to be jurisdictional, is directory only. So far from making a failure to follow all its requirements fatal to the proceeding instituted, the Code, after enumerating several imperfections, which shall not, after "verdict or decision," invalidate the judgment by § 722, expressly enacts: "Each of the omissions, imperfections, defects, and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied and the proceeding amended by the court wherein the judgment is rendered, or by an appellate court." If it be said that this section refers to cases in which judgment has been rendered, and that in action number one there was none, the fact in the statement may be admitted without impairing the argument to be drawn from the provision just quoted. If this power of amendment must, as the mandatory language requires, be exercised after judgment, it certainly contains no limitation upon the right of the court to exercise it before. Indeed, the whole title of the Code, title 1, chap. 8, of which the section just quoted forms a part, is not an enabling statute authorizing the court to do what it was prior to its passage powerless to accomplish, but is rather a command to exercise the powers it already possessed. What the court is required to do by § 722, after judgment, it is also commanded to do by § 723, before judgment, in these words: "And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party." It follows, then, we think, very clearly that, the original order appointing Claxton receiver in action number one was not void, and that this court at Special Term, by virtue of its general equity powers, as well as by the express provisions of the Code, had the right to amend it.

From the fact, then, that the original order appointing Claxton receiver was not void, by reason either of the terms of the order, or on account of the bond having but one surety as such order provided, it follows that the plaintiffs in actions Nos. two, three, and four were not entitled to be paid, because of the invalidity of the first appoint-

ment of the receiver; and if they are to succeed upon this appeal, it must be because the recovery of their judgments and subsequent proceedings entitle them to priority of payment. That position will now be examined. It will not be denied that failing debtors can, by voluntary assignment, place the title to their property in the hands of trustees, to be converted into money for equal distribution among their creditors. Whilst such a trust was being honestly administered, no creditor by suit could obtain a preference over others; nor could the parties who made the assignment, after the acceptance of the trust by the assignee, take it from his hands without the consent of the creditors, and prevent its distribution. If an insolvent partnership could, by their unaided action, thus place its assets into the hands of a trustee for equal distribution, why may it not come into a court which has plenary power thus to distribute the estate without the consent of the partners, and ask that the order of the court shall place the effects in the hands of its own officer for the same purpose?

Is not the consent of the parties in open court to an order by the court, and the acceptance of the trust by the court, indicated by its order, and the appointment of its receiver, equivalent to, and as valid as the appointment of an assignee by general assignment, voluntarily made and accepted without the order of the court? Cannot parties do, with the sanction and permission of a court of competent jurisdiction, that which they might properly do without it, and is a trust which the court has accepted by the consent of parties liable to be terminated at the will of those who asked its aid, whilst one taken by an individual through force of a written consent from the same source is irrevocable? If these questions must, on the authority of prior adjudications, be answered in favor of the appellants, we would still be unable, by any reasoning known to us, to demonstrate the correctness of such a response. It is true that the cause in which the appointment of the receiver was made has not yet proceeded to judgment; but it is also true that the owners of the partnership property have, by their voluntary act, placed it in the hands of this court for equal distribution, and that the court has assumed jurisdiction over it for that purpose. It has not yet made its final orders of distribution, but by the appointment of its receiver it has assured all persons interested that it will make that order in due time, and until it settles the terms thereof it will hold it for that purpose. If one or more creditors can, under such circumstances, obtain priority by judgment and execution, then the Supreme Court is powerless to accomplish what it has undertaken to do; and if the parties to the action may discontinue it, vacate the order appointing a receiver, and resume control of the property, then the court is only the creature of the will of others, and not the independent power clothed with the authority to do what it has undertaken; and though, at the instance of owners, it has assumed a trusteeship for the benefit of all creditors,

it must, nevertheless, suspend its functions at the beck and instance of those persons who first invoked them. Such a conclusion, it seems to us, must be unsound. The court holds the property of the insolvent firm for equal distribution, and will not, and ought not to surrender its trust, or do any act which will prevent it from doing full and complete justice to all parties interested. Neither can its action be unreasonably delayed. The property, or fund from its sale, is in the hands of the court, and any one interested may quicken action by proper application. There can be, it seems to us, no sound or good reason for taking from the court the trust it has assumed. It holds the property in trust for the benefit of those who may be entitled to it, and all can be fully protected. Why should it, too, upon an *ex parte* application, without hearing and notice to all interested, grant the relief asked for by the motion of the appellants? There may be other parties not heard who have superior equities upon the funds in its hands, even though an equal distribution is defeated. It should not, therefore, be paid out until, in some way, the rights of all are settled and ascertained. It would be manifestly unjust, as it seems to us, at this stage of the proceedings, at least, to part with the property, or any part thereof.

It may, however, be argued that the principles which have been enunciated are at war with adjudged cases, and particularly with Waring *v.* Robinson, 1 Hoff. 524; Adams *v.* Hackett, 7 Cal. 187; Adams *v.* Woods, 8 Id. 153; Adams *v.* Woods and Haskell, 9 Id. 24, which are relied upon to sustain the appeal. If those cases do decide that insolvent partners cannot in good faith come into a court of equity and ask it to make a just and equal distribution of the partnership property among creditors, and when the court has entered upon the execution of the trust with the consent of all the owners, by the appointment of its receiver thereof, that its jurisdiction and power can be thwarted by the action of one or more creditors seeking a priority by judgment and execution, then they cannot be acquiesced in and followed by this court. A court of equity has as full and ample power to administer and dispose of the insolvent debtor's estate, voluntarily entrusted to it by its owner, as the Federal Bankrupt Court had over the estate of an insolvent debtor who instituted voluntary proceedings in bankruptcy. An action at law in behalf of any creditor can no more take the funds and property out of the hands of the one court than out of those of the other; and whilst, to a certain extent, it is true that in both cases the proceeding is somewhat subjected to the control of the parties instituting it, yet it must also be true, that when the court has acted upon the application, and vested the property in the one case in an officer called an assignee, and in the other in one called a receiver, but both possessing the same power and appointed for the same purpose, — that of holding the property pending a final decree, — in neither instance can the parties who have placed the property in the hands of the court by their

own action deprive the court of its power to distribute. The property, when once in the hands of the court, is pledged and dedicated to the objects of the proceeding, and in it others become interested who have a right to invoke the action of the tribunal which has assumed control over it. But the cases cited are unlike the present. In all of them the suit was instituted by the one partner against the other for his own protection against the alleged fraudulent conduct of such other. They all lacked the elements of admitted insolvency, and the consent of all the partners to the court's taking the property and holding it for a final, just, and equal distribution among all creditors. It is possible, though it is not fully conceded to be sound, that when one partner seeks the aid of the court against the other, and the tribunal invoked simply holds the property for the benefit of its owners, it may permit one creditor to obtain priority over another. Perhaps in such a case, as the court has not taken the preliminary step for the purpose of making a final distribution among creditors, it might be plausibly argued that the creditors seeking payment by action are not endeavoring to defeat the trust which the court has assumed. In the case before us, however, no such argument can possibly apply. The court has assumed to act, with the consent of the original owners, to make a just and equal distribution. It holds the property for that purpose. Creditors are the *cestui que trusts* of the court, and they cannot be defrauded unless the court lends itself to the fraud. The tribunal which has assumed to act must proceed, and such action can neither be thwarted nor defeated by the action of any creditor.

The order appealed from must be affirmed, with ten dollars costs and the disbursements for printing.

BOARDMAN, J., concurred. LEARNED, P. J., dissented.

DAVIS *v.* HOWELL.

33 N. J. Eq. 72. 1880.

RUNYON, CHANCELLOR. John C. Bennett and James M. Andrews were, on or about the 10th of February, 1876, partners in business in Phillipsburg. On that day they made an assignment under the Assignment Act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment under the act for the equal benefit of his creditors to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent of the partnership debts. Most of the partnership creditors have put in their claims under the assignment

of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews' estate with legal proceedings if their demand be not complied with. The complainant therefore comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews' estate, and he is made a defendant.

The question presented has been often discussed, and though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. Story's Eq. Jur. § 675; Snell's Prin. of Eq. 419; Story on Partn. § 376; 3 Kent's Com. 64, 65; Pars. on Partn. 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte* Crowder, 2 Vern. 706; it was affirmed by Lord Hardwicke, and though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon, and it has existed ever since in the English Chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this State. Cammack *v.* Johnson, 1 Gr. Ch. 163; Matlack *v.* James, 2 Beas. 126; Mittnight *v.* Smith, 2 C. E. Gr. 259; Scull *v.* Alter, 1 Harr. 147; Curtis *v.* Hollingshead, 2 Gr. 402; Brown *v.* Bissett, 1 Zabr. 46; Linford *v.* Linford, 4 Dutch. 113. In Scull *v.* Alter the Supreme Court recognized the rule in all its parts. Chief Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has

been repudiated. Camp *v.* Grant, 21 Conn. 41. It has been repudiated also in certain other States. Bardwell *v.* Perry, 19 Vt. 292; Emanuel *v.* Bird, 19 Ala. 596. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In Wilder *v.* Keeler, 3 Paige, 167, Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was at the death of G. F. Lush a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity." The doctrine was recognized in Morgan *v.* Skidmore, 55 Barb. 263. In Pennsylvania, in Bell *v.* Newman, 5 S. & R. 78, 91, 92, Gibson (afterward chief justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In Black's Appeal, 44 Pa. St. 503, and again in McCormack's Appeal, 55 Id. 252, the doctrine is completely recognized and affirmed. In South Carolina, in Woddrop *v.* Price, 3 Desauss. 203; Tunno *v.* Trezevant, 2 Id. 264, and Hall *v.* Hall, 2 McCord's Ch. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In Murrill *v.* Neill, 8 How. 414, it is recognized by the Supreme Court of the United States.

The objection that is always pressed as the conclusive argument against it is that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim, as to the balance of his debt which the partnership assets may not be sufficient to satisfy, with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. Wisham *v.* Lippincott, 1 Stockt. 353; Randolph *v.* Daly, 1 C. E. Gr. 313; National Bank *v.* Sprague, 5 Id. 13; Howell *v.* Teel, 2 Stew. Eq. 490. But if he has no such lien and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will,

in like manner, and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor Kent. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner." 3 Kent's Com. 64, 65. The obvious infirmity of the objection to the rule is that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there are in the case of all such rules, instances in which it works unsatisfactorily, yet that, on the whole, and as a rule, it has not operated unjustly, is evidenced by the fact that it has existed so long (*Ex parte* Crowder was decided in 1715), notwithstanding opposition, and that in Massachusetts at least it has, in the face of the opposition referred to, been established by legislative authority, and that, too, as lately as 1838. In this State it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in Wisham *v.* Lippincott, 1 Stockt. 353, 356, the Chancellor expressed strong doubt of its correctness as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant — the partnership estate — and Andrews' estate in equal shares.

PEOPLE *v.* E. REMINGTON & SONS.

121 N. Y. 328. 1890.

GRAY, J. The only question presented for our consideration and determination by this appeal is, whether the creditor of this insolvent corporation was entitled to prove and receive a dividend upon the full amount of the debt due from the insolvent estate; or whether the receivers, as the personal representatives of the insolvent, could reduce the claim of the creditor, for the purpose of a dividend, by compelling a deduction, from the amount of the proved debt, of the value of collateral securities, or of any proceeds thereof. (After referring to the conflict of opinion on this subject, and to the bankruptcy rule, the learned judge continued:) The agreement between the debtor and creditor was that the debt should be paid. That debt was a definite quantity, and nothing less than its full amount can be said to be the debt. It is not altered or affected in its amount because the creditor may hold some collateral security. That is not a factor of the debt, but is merely an incident to the debt. The very force and meaning of a collateral security are in the idea of a guarantee of the performance of the principal agreement, which was to pay the debt. The property which a creditor holds as collateral to the indebtedness of his debtor, secures him to that extent, in case his debt is not paid in full by the debtor, or by his estate.

As between the creditor and his debtor, the latter could not compel the former to resort first to his collaterals before asserting his claim by a personal suit. The debtor has no control over the application of the collaterals. It is a general rule of equity that the creditor is not bound to apply his collateral securities before enforcing his direct remedies against the debtor. 1 Story Eq. Jur. § 640; Lewis *v.* United States, 92 U. S. 618. Then on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor cannot, under those circumstances, enforce his direct claim against the debtor until he has realized on his securities? Is the rule capable of such inversion? I cannot see any reason in the proposition. I do not see why, in the absence of intervention by positive or statutory law, the engagements of parties should be varied. If in bankruptcy another method was prescribed by the statute for the proof and payment of debts, it was a matter purely within the discretion of the Federal Legislature. Its constitutional right to establish uniform laws on the subject of bankruptcies throughout the United States obviously included the power to prescribe the mode of marshalling the insolvent's assets for distribution among creditors; and being the law of the country, it becomes a part of every contract. But this furnishes no reason why the established rules of courts of equity should be changed in the administration of the estates of insolvents.

In Kellock's Case, L. R. 3 Ch. 769, decided in 1868, it was held that in the winding up of a company under the Companies Act of 1862, a creditor holding security might prove for the whole amount due to him, and not merely, as in bankruptcy, for the balance remaining due after realizing upon or valuing his security. In Greenwood *v.* Taylor, 1 Russ. & M. 185, decided in 1830, it had been held that the practice in bankruptcy furnished a precedent which should be followed in the administration of assets; but in Mason *v.* Bogg, 2 Mylne & C. 447, decided in 1837, Lord Chancellor Cottenham said: "That the principle which the decision in Greenwood *v.* Taylor professes to follow cannot be the principle of a court of equity is further proved by the circumstance that in bankruptcy a particular mode is prescribed. A creditor may there prove, but then he must give up his security; or he may obtain an order that his security should be sold, and that he should prove for the difference. In equity, however, a party may come in and prove without giving up or affecting his securities, except so far as the amount of his debt may be diminished by what he may receive." Mason *v.* Boggs was a case of the administration of the insolvent estate of a deceased person; and Lord Cottenham further remarked, as to the rights of a mortgage creditor: "A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see." Then Sir William Page Wood, speaking in Kellock's Case, *supra*, of the decision in Greenwood *v.* Taylor, said: "This court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner — different from the mode in which it would have been dealt with in the Court of Chancery. . . . We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

In this country, we find that rule more generally prevailing which allows the creditor holding securities to prove and to receive his dividend on the whole debt. It is asserted in Judge Story's work on Equity Jurisprudence (§ 524), and in the following cases: *In re* Bates, 118 Ill. 524; West *v.* Bank, 19 Vt. 403; Moses *v.* Ranlet, 2 N. H. 488; Findlay *v.* Hosmer, 2 Conn. 350; Logan *v.* Anderson, 18 B. Monr. 114. In Patten's Appeal, 45 Pa. St. 151, it was held in relation to an assignment made for creditors that the unsecure creditor has no right to the benefit of the securities held by another creditor until that other's whole debt was paid. In Allen *v.* Danielson, 15 R. I. 480, which was a case arising under an insolvent assign-

ment, Durfree, C. J., delivering the opinion of that court, said: "According to the decided weight of authority, the rule is to allow all the creditors to bring in their claims in full, and have dividends accordingly." That opinion is both well considered and able; and it deliberately overruled a prior decision of the court in the case of *In re* Knowles, 13 R. I. 90. The learned chief justice admitted the error into which they had previously fallen, and remarked that they would have decided the case differently if they had then, as now, the same array of authorities presented, and that in adopting the other view, not only the correct rule would be established, but the rule which was generally prevalent elsewhere.

The counsel for the appellants finds decisions by the courts of Massachusetts, Iowa, and Maryland, which undoubtedly conflict with the views we incline to. But I think that whether we look at this question in the light of reason or of the adjudged cases, the rule which best commends itself to our judgment is that which leaves the contractual relations of the debtor and his creditors unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement. The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate.

Judgment affirmed.[1]

§ 4. THE BANKRUPTCY OF THE FIRM.

THAYER *v.* HUMPHREY.

Reported *supra*, p. 117.

BROADWAY NAT. BANK *v.* WOOD ET AL.

Reported *supra*, p. 129.

[1] *In re* Plummer, 1 Phillips, 56 (1841), Cottenham, L. Ch., said: "Now, what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20*s.* in the pound."

In re MARWICK.

Davies (U. S. D. C.), 229: 2 Ware, 229. 1845.

Ware, D. J. Two questions have been raised and argued in the present case. The first is whether the creditors of a partnership can, in any case, be admitted to prove their claims against the separate estate of one of the co-partners, for the purpose of receiving dividends in concurrence with the separate creditors of the co-partner. The second is whether, admitting that they may in some cases, the partnership creditors can be admitted so to prove under the facts in this case.

The 14th section of the Bankrupt Act provides, when two or more persons become bankrupt who are partners in trade, that separate and distinct accounts shall be kept, in the settlement of their estates, of the joint effects of the firm and of the separate effects of the several partners, and when the whole expenses are paid, that the net proceeds of the joint property shall be applied to the payment of the joint creditors, and the separate property of each partner shall be applied to the payment of his separate creditors, and that the creditors of the respective estates shall be allowed to receive dividends from the other estate only after the creditors of that estate shall have been fully paid. This is in substance the rule established by the law, and it is quite clear, where there is both a joint and a separate estate, that the creditors of neither can prove against the other estate for the purpose of receiving dividends, except from the surplus remaining after its own proper creditors have been fully satisfied.

This general rule for marshalling the assets and claims is taken from the English bankrupt law. But under that system there are exceptions, as well established as the rule itself. One of these exceptions is where there is no joint estate and no living solvent partner, as is the fact in the present case. In such a case, the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. Story on Partn. § 372. Eden on Bank. 172. But to bring the case within the exception, there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1 11*s.* 6*d.* And again, there must be no living solvent partner — and solvent is here used not in its ordinary sense, that is, the ability to pay the whole of one's debts — but in the sense of non-bankrupt partner. For though he may be in fact insolvent, and unable to pay the whole of his debts, if he be not actually in legal bankruptcy, the exception is excluded and the general rule prevails. *Ex parte* Jansen, 3 Madd. 229. The principle is that while there is any fund, however small, to which the joint creditors may resort, they cannot come against the separate estate in competition with the separate creditors; and though a per-

son may be insolvent, if he be not in actual bankruptcy, and thus devested of all his property, he may still have the ability to pay part of his debts, and this possibility is held to be enough to exclude the joint creditors from sharing in the separate estate of the bankrupt partner, except in the surplus after the separate creditors are paid.

Such is the general rule under the English bankrupt laws, and such the character of the exception to the rule, which it is supposed may be admitted under our law. Our statute has adopted the general rule, without taking notice of any of the exceptions. It does not appear to contemplate the case of there being no joint property, and as it passes it by in silence, it may be a grave question, whether it does not leave such a case open to the application of the general principles of equity. But as there is a joint fund in the present case, it is immaterial whether it does or not, unless the court may look behind the fact of there being a joint fund, to the manner in which it has been created.

It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered his first account of the partnership estate in October, 1844, in which the whole of the assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise or collect a debt, on which he obtained $40, and rendered to the court a supplementary account; and it further appears, that the money to take up this note was actually advanced by Charles E. Marwick, a creditor of the separate estate. Now the argument is that if the exception to the general rule of marshalling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor, by purchasing for a small sum a partnership demand, for which nothing could have been obtained except for this purpose. Allowing the premises on which the argument is founded to be correct, it does seem to present itself with some force to the equitable consideration of the court. The effect in the present case will be, that the separate creditor will receive nearly the whole of his claim, and the joint creditors but a small percentage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion that, admitting the assumption on which the argument is founded, it cannot prevail. In the first place, if this matter is viewed as a struggle between the two classes of creditors, it is a strife on the part of the separate creditors, not *de lucro captando*, but *de damno vitando*. A creditor may, without any grave imputation in the forum of conscience, be allowed all fair and legal means to avoid a loss, though it may incidentally be at the expense of another creditor. And though it is a maxim in equity jurisprudence that equality is equity, yet the court holds the maxim subordinate to legal priorities, which one

party may by his diligence acquire over another. And further, the whole subject, of marshalling the assets and claims between the joint and separate creditors in bankruptcy, involves some of the most difficult problems that occur in the whole range of jurisprudence. It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis, and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. Eden on Bank. 169, 174; Story on Partn. §§ 374, 382.

This system is admitted to be not entirely satisfactory; it has sometimes been departed from and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute, which is not found to be attended by equal difficulties. Dutton *v.* Morrison, 17 Ves. 207; *Ex parte* Elton, 3 Ves. 238.

If, then, we admit that the equitable doctrines of the English courts, in the administration of their bankrupt law, are applicable under our statute, how will the case stand? In the first place, if this fund had been brought into court in consequence of the purchase of this note by any other person than a separate creditor, it is clear there would have been an end of the case. What difference does it make that he has advanced the money, and thus created the fund? It was the duty of the assignee to make the most of the assets. If, with the knowledge that $40 could be obtained by the transfer of this note, he had rendered it into court as worthless, he might have been compelled to pay the money out of his own pocket. The fund would then have been produced in this way, and the joint creditor would have been in the same condition he is now. It was not for the assignee to inquire who the purchaser was, or what were his motives in making the purchase. And even suppose that he might have done this and refused to sell to a separate creditor for such a purpose, the creditor might have gone to the debtor and furnished him the money to take up the note, and thus indirectly obtain the same result. And indeed this seems to have been the course adopted in the present case; for the note was nominally taken by one of the company, who was liable upon it, though the money was advanced by the creditor. So that if we were to adopt the principle of going behind the fact of there being a fund, to inquire whether that had not been inequitably created by the management of the separate creditor, the court would at once be involved in inextricable difficulties.

The object of this inquiry is to reach the supposed equity of the case, by making a more just and equal distribution of the assets between the different classes of creditors, and to prevent the separate creditors from creating out of worthless assets a small sum for the sole purpose of preventing the joint creditors from sharing with them the separate assets. But, after all, is not this supposed equity more apparent than real? Each class of creditors originally trusted to different funds and different responsibilities; one to the social and one to the separate responsibility. The general equity would, therefore, seem in all cases to confine each class of creditors to that fund to which they primarily trusted, unless in a case where there had been a fraudulent or improper abstraction from one estate for the purpose of increasing the other. And this is the general rule, not only in bankruptcy, but in general equity. Each class of creditors have a right of prior payment out of the estate to which they are supposed to have given credit, and the other class can only go against the surplus. If a creditor of one partner attaches partnership property, his attachment only holds the right or interest which the parties shall be found to have in the property after an account is taken and the joint creditors are paid. 13 Kent's Com. 64-65, Note c, 5th ed; Story's Partn. § 363. The equity of each class of creditors against their proper fund certainly seems to be stronger than that of the other class who never could have looked to it for their security, except so far as there might be a surplus after discharging its own proper liabilities.

The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a *casus omissus*, not contemplated, and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes, that when the statute covers the whole case in all its circumstances, and makes no exception, none can be made by the court.

My opinion, on the whole, is, that the proof cannot be admitted against the separate estate, in competition with the separate creditors.

AULTMAN ET AL. *v.* WILSON.

44 N. E. (Ohio St.) 1092. 1896.

EXCEPTIONS of the plaintiffs in error to the final account of the assignee and to the inventory were determined in the Probate Court against the assignee, who took an appeal to the Court of Common Pleas. The exceptions challenged the right of the assignors to an allowance in lieu of a homestead which had been made to them. In the Court of Common Pleas the findings of fact and conclusions of law

were stated separately as follows: "And the court finds that the said M. A. & C. S. Landis at the time they made their deed of assignment, November 25, 1890, were partners and husband and wife, living together; that they were residents of the State of Ohio, and were not, nor was either of them, the owner of a homestead; that they demanded out of the property assigned, which was partnership property solely, $500 worth thereof in lieu of a homestead, and, having selected the same, the appraisers appointed by the Probate Court under said assignment, on making the appraisement, set the same off, and the same was thereupon, and before any exceptions were filed to the inventory, taken into the possession and control of the said assignors, and by them consumed and disposed of; that on the 31st day of December, 1890, the inventory and appraisement was filed in the Probate Court. Said inventory set out the specific articles, and their value, which, at the request of the assignors as husband and wife, the appraisers had so set off to them, and stated that the same had been so set off. At the time said property was so set off to the assignors in lieu of a homestead, the assignee took counsel of a reputable member of the bar of Columbiana County, learned in the law, who was at the same time the attorney for said assignors, who advised him that under the law of Ohio the assignors were entitled to the property so set off, and about the same time the attorney for one of the creditors said to the assignee that the assignors were not entitled to such exemption. The final account of the assignee was filed in the Probate Court July 30, 1891. The first exceptions to the inventory were filed September 16, 1891. On consideration of the above-recited facts the court finds, as its conclusions of law thereon, that the goods so set off to said assignors in lieu of a homestead ought not to have been so set off to them, that they were not entitled to them out of the partnership property, that the assignee should be charged with the amount thereof, and that the same, to wit, the sum of $500, should, and the same is hereby ordered to be, added to the amount hereinbefore found as chargeable against said assignee; to which finding and conclusion of law charging said assignee with said amount so set off to the assignors in lieu of a homestead the said assignee excepts." On petition in error the Circuit Court found that the Court of Common Pleas erred in its conclusion of law from the facts found, reversed its judgment, and rendered a final judgment in favor of the assignee upon the facts so found. This petition in error is prosecuted for the reversal of the judgment of the Circuit Court and the affirmance of that of the Common Pleas.

W. H. Spence and *A. H. Clark*, for plaintiffs in error.

H. R. Hill and *Billingsley*, *Taylor*, *& Clark*, for defendant in error.

SHAUCK, J. However conflicting the decisions elsewhere may be, it is settled in this State that "the members of an insolvent firm are not entitled to the statutory exemptions out of partnership property after it has been seized in execution by partnership creditors, not-

withstanding all the members join in demanding the exemptions." Gaylord *v.* Imhoff, 26 Ohio St. 317. And it is manifest that the vesting of the partnership property in an assignee for the benefit of creditors is the legal equivalent of its seizure in execution. It is said, however, that a different rule should apply here, because the relation of husband and wife existed between the members of the insolvent firm, the ownership of the property and the right to demand the exemption being alike joint. Section 5441, Rev. St. provides that "husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female having in good faith the care, maintenance, and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may in lieu thereof hold exempt from levy and sale real or personal property to be selected by such person," etc. Husband and wife living together, by the terms of this section, constitute a family, for whose benefit the exemption is allowed, as do widowers, widows, and unmarried women, under the conditions named. But there is no reason to suppose that the general assembly was undertaking to impart a joint character to the right. Although a husband lives with his wife, he is the person upon whom is conferred the right of selection. The allowance provided for in this section is in lieu of the family homestead, which may be held exempt from sale under the provisions of section 5435, Rev. St. where husband and wife, living together, are also constituted a family for whose use the exemption is made; yet the right to demand it is primarily that of the husband alone, the wife having no right to make the demand unless the husband fail or refuse to make it. Nor is there anything in the legislation upon this subject showing an intention on the part of the general assembly to change the settled and familiar rule that homestead rights attach only to the individual property of the debtor, and that partnership property must, to the extent necessary, be devoted to the payment of partnership debts. The facts found by the trial court show that, when the goods were set off to the assignors upon their demand, their right to the exemption was denied by counsel representing some of the creditors of the firm. In that situation it was the duty of the assignee to hold the property subject to the order of the Probate Court, which alone had original jurisdiction to determine the question of their right. In delivering the property without such order he acted at his peril, and the advice of counsel will not shield him from the consequences of a mistaken course.

Judgment of the Circuit Court reversed, and that of the Common Pleas affirmed.

GREEN ET AL. *v.* TAYLOR ET AL.

Reported *supra*, p. 113.

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§ 4. THE BANKRUPTCY OF A PARTNER.

ANONYMOUS.

3 Salk. 61. 1696.

Two joint traders; one of them became a bankrupt. Per HOLT, CH. J. The commissioners cannot meddle with the interest of the other, for it is not affected by the bankruptcy of his companion.

MURRAY *v.* MURRAY ET AL.

5 Johns. Ch. 60. 1821.

THE firm of Robert Murray & Co., composed of the plaintiff, of Robert Murray, G. W. Murray, and John R. Wheaton, failed in 1796, at which time plaintiff was in England on the business of the firm. G. W. Murray and Wheaton went to Europe. In 1798, Robert Murray, by virtue of a power of attorney from his co-partners to him for the purpose, made assignments of the firm property to J. B. Murray and J. I. Clark in trust for particular creditors. The bill in this action charged that these trustees, after paying the particular creditors, had in their hands a balance belonging to the firm. All of the firm, except the plaintiff, became bankrupts under the bankrupt law of the United States of June, 1800. The other important facts appear in the opinion.

Wells and *T. A. Emmett*, for the plaintiff.

S. Jones and *D. B. Ogden*, for the defendants.

KENT, CH. The question in this case, between the plaintiff and the assignees of his bankrupt partner, relates to the control and distribution of the partnership fund. The plaintiff, in a particular manner, claims the balance reported to be due from the estate of John I. Clark, deceased, to the house of Robert Murray & Co., and insists that he is entitled, in preference to the assignees, to distribute that balance, and to disregard the settlement which was made by those assignees with the executor of Clark.

The defendant, John B. Murray, and John I. Clark were trustees to a large amount, under assignments from the house of Robert Murray & Co., and though the bill seeks to call both those trustees to account, and to claim the balance due from each of them, yet the plaintiff's counsel, upon the argument, did not seem to press, very seriously,

his claim against John B. Murray, who had already accounted and settled with his assignees. The account of J. B. Murray was taken and stated, with the assent of the plaintiff; and we will now examine whether the plaintiff be not now concluded in respect to his claim against J. B. Murray.

The earliest commission of bankruptcy was taken out against Robert Murray, and his property was assigned under the Bankrupt Act, on the 2d of July, 1801; and on the 8th of September, 1801, the present defendants, Riggs, Ward, and M'Evers, as his assignees, filed their bill to call Clark and J. B. Murray to account for the partnership property, and all the partners of the house of Robert Murray & Co., including the present plaintiff, were made parties to the bill. The bill prayed that those two trustees might be decreed to pay over to them the partnership effects in their hands, in order that they might pay the partnership debts. The partnership debts were alleged to amount to upwards of $700,000, and the private property of Robert Murray, exclusive of his share of the partnership property, was stated to be very inconsiderable. To this bill a demurrer was filed by the present plaintiff, on the ground that the funds of the house of Robert Murray & Co., held by J. B. Murray and Clark, ought not to be paid to the assignees. This demurrer was filed on the 5th of March, 1805, and it raised the very question now under discussion in this suit. (After holding that the decree in that action could not be impeached in this action, the chancellor continued:) The plaintiff's claim against the executors of Clark is not resisted upon the same ground; for here the plaintiff was no party to any of the rules or orders, under which the suit of the assignees against the executors, in respect to the partnership moneys, chargeable upon the estate of Clark, was finally and amicably settled. And here the general question occurs, whether the assignees of the bankrupt partners had not competent power to receive partnership funds, and discharge partnership debtors, even without the assent of the remaining solvent partner. If this point should be decided in the affirmative, it would equally protect the defendant, J. B. Murray, in his settlement with the assignees, without having recourse to the plaintiff's assent, or the decision in the other suit.

It is admitted, in all the cases, that the assignees of a bankrupt partner, and the remaining solvent partner, are tenants in common in respect to the partnership funds; and, like all tenants in common, one party cannot call the joint property out of the hands of the other. There is no such case. They are entitled equally to the possession in law. This was expressly held in Smith *v.* Stokes, 1 East, 363. Trover will not lie for one against the other. It has, also, been held, that the solvent partner and the assignees of the bankrupt cannot sue alone, and that they must unite in actions at law. Ashurst, J., in Graham *v.* Robertson, 2 Term, 282; Eckhardt *v.* Wilson, 8 Term, 140. What right, then, has the solvent partner to come into this court, to call the entire joint funds out of the possession of the assignees, who are his

co-tenants in common, and, as such, have an equal control over the joint fund? There is no case giving to either party the absolute, exclusive possession and distribution of the entire effects. Neither party is strictly entitled, as against the other, to anything more than his share of the surplus, after the partnership debts are paid. Field *v.* Taylor, 4 Vesey, 396.

In this case, there is no justice or equity in the pretension of the plaintiff. He admits that the partnership debts greatly exceed the partnership funds, and that there cannot be any surplus coming to either party. His sole object, then, is, to have the partnership funds, which have been or may be under the control of the assignees, pass into his hands for distribution, instead of having them distributed by the assignees; and he denies all right in the assignees to touch or distribute any of the partnership funds, and wishes to vacate all that they have done. But it appears that a great majority, in interest of the joint creditors, and who have partnership debts due them to nearly $500,000, have come in and proved their debts under the separate commission in the case of Robert Murray. These include almost all the debts, except such as were provided for under the assignments, to J. B. Murray and Clark. It also appears that the assignees, after having by suit obtained a liquidation of the balance due from the estate of Clark, and bestowed great care and efforts towards the recovery and security of that debt, settled it upon terms which they deemed prudent and just, under all the circumstances. This settlement and consequent discharge of the estate of Clark was in February, 1810; and in October following, due public notice having been given to the creditors, several of them appeared before the commissioners of bankrupts and ratified that settlement. If there was anything wrong in the settlement, it was for the creditors to disturb it; and it would be most unreasonable to permit the plaintiff to set aside all that had been done by the assignees under such a sanction from the creditors, merely for the purpose of making his own distribution. There is no charge of misconduct in the assignees. The whole bill is a denial of competency to act, though every case on the subject admits that assignees of a bankrupt partner are tenants in common with the solvent partner. If the pretensions of either party to an exclusive distribution of the partnership funds, were to be examined upon principles of policy and equity, the assignees would have the better pretension, in the view of this court, because the solvent partner has it in his power to give preference, and defeat the equality and equity of the bankrupt system. Assignees, on the other hand, are bound to make a ratable distribution of the assets; and, being trustees under the control of this court, there is no good reason why their equal rights at law as tenants in common should suffer diminution here. They are tenants in common, but with particular equities in them, as Lord Eldon observed, "Vastly beyond what tenants in common have where no bankruptcy has occurred;" and their claim to the distribution of the partnership

fund has been encouraged and strengthened by the decisions in chancery. This will appear by a review of some of the leading chancery cases.

It was well established in the time of Lord Hardwicke, that joint creditors could come in and prove their debts under a separate commission of bankruptcy, against one partner, for the purpose of assenting to, or dissenting from, the certificate of discharge to the bankrupt. They were not allowed to come in and prove, for the purpose of receiving dividends with the separate creditors; and they were put to the necessity of filing a bill, and bringing before the court the assignees of the bankrupt and the solvent partners, and having the account of the joint estate taken in their presence. The principle was, that the joint creditors had a preferable claim upon the joint effects, and the separate creditors upon the separate estate; and, therefore, the joint creditors could not come in upon the separate estate until all the separate creditors were paid; and this was upon a plain rule of equity, that he who has two funds to resort to, shall not satisfy his debt out of that one of them to which another creditor can only resort, until he has exhausted the other fund.

This more ancient doctrine recognized, of course, the equal right of the assignees to the distribution of the joint fund, and the right of the joint creditors to come in under the cover of the separate commission. It only interfered with the application of the joint fund, by marshalling the joint and separate assets equitably among the joint and separate creditors. Indeed the right of a joint creditor to come in and prove his debt and take his dividend, under a separate commission, is a clear legal right; for a joint creditor is still a creditor of the bankrupt, and all the control that equity exercises over this right is merely to marshal the funds upon equitable principles.

There is nothing, even upon the ancient doctrine in chancery, that gives to the solvent partner any paramount right over his co-tenants, the assignees, and especially, a right to annul their acts and call them to an account for all the joint funds in their possession. It was determined, in the case *Ex parte* 1 Atk. 133; Willes, 67, both by Lord Hardwicke and by the Court of King's Bench, that a separate commission of bankruptcy might issue against one partner for a joint debt, upon the petition of a joint creditor. And the chief justice of the Common Pleas, in giving the opinion of the court, said, that under a separate commission against one partner the bankrupt's share of the partnership effects might be taken and sold, making satisfaction for the partnership debts, if joint creditors elected to come in under the separate commission, "as they generally have." The certificate, under the separate commission, was a discharge from the partnership, as well as the separate debts, because the partnership creditors might come in and prove their debts. This decision considered a commission as an execution, and not as an action; but Lord Eldon, in *Ex parte* Brown and *Ex parte* Munton, 1 Ves. & Bea. 60, admitted there was a difficulty in considering a com-

mission of the bankruptcy as an execution, in a strict sense; and that there was a difficulty also in respect of the other partners, in allowing a separate commission to issue upon a joint debt.

Lord Thurlow, after much consideration and consultation with the judges, adopted a different course on this subject, and allowed the joint creditors not only to come in under a separate commission and prove their debts, but, as a matter of right, to take dividends upon the separate estate; and he held a commission of bankruptcy to be an execution for all creditors.

Lord Loughborough again departed from the rule adopted by Lord Thurlow, and restored the principle, though not the entire practice, of Lord Hardwicke. He directed the assignees under a separate commission, to take an account of the joint estate, and applying that to the discharge of the joint creditors, to ascertain the shares belonging to the residue of the bankrupt and to the solvent partners. He adopted the reasonable practice of marshalling the dividends, and compelling the joint creditor to exhaust the joint fund, before he exercised the legal right of proving his debt, and taking his dividends out of the separate fund. The case *Ex parte* Elton, 3 Vesey, 238, contains, at large, the able discussion and lucid principles of Lord Loughborough. He allowed the partnership creditor to prove his debt under the separate commission, and that his dividend should be set apart, and allotted to him out of the separate fund, but not paid until an account had been previously taken of the joint fund, and it had been ascertained how far this debt could be satisfied out of it. He said that the joint creditor ought to be admitted to prove his debt under a separate commission, for the purpose of assenting to, or dissenting from, the certificate, and for receiving such surplus, beyond the amount of separate debts, as joint creditors would be entitled to, if there were two commissions. The court ought not to allow a joint creditor, who has two funds, to attach himself upon one fund, to the prejudice of those who have no other, and to neglect the other fund. A separate creditor cannot take a dividend upon a joint estate, ratable with the joint creditors, for at law he can only attach the interest of his debtor in that property. It is a settled rule in equity, that the joint estate was to be first applied to partnership debts, and the separate estate to the separate debts, and if the joint creditor was admitted, by an order in bankruptcy, to receive a dividend from the separate estate, the order, as he observed, would carry a chancery suit in the bosom of it. The assignees would be compelled to file a bill on behalf of the separate creditors, in order to restrain the dividend and compel a contribution from the other parties and to make them discover and apply the partnership fund, in order to throw the joint creditors upon it, and prevent the separate estate from being exhausted. The plain rule of distribution is, that each estate shall bear its own debts, and the usual directions in bankruptcy are to apply the funds distributively, the joint estate to the joint debts, the separate estate to the separate debts, and the surplus of each to come

in reciprocally to the creditors remaining upon the other. The Lord Chancellor, accordingly, in that case, and in pursuance of this reasoning, admitted the joint creditor to prove, but not to receive, a dividend. He directed that to be reserved, until an account should be taken of what the joint creditors might receive from the partnership effects. The same rule and practice was followed in *Ex parte* Abell, 4 Vesey, 837. The joint creditors were not allowed to take a dividend under the separate commission, until the same creditors were paid.

Lord Eldon pursued the rule and practice of his immediate predecessor, Lord Loughborough, without presuming to say which was the best rule, that or the one of Lord Thurlow. In the case *Ex parte* Clay, 6 Ves. 813, and in two cases cited in a note to that case, Lord Eldon admitted the joint creditor to prove, for the purpose of keeping separate accounts, and assenting to, or dissenting from, the certificate, but not to receive the dividends, in the first instance, with the separate creditors. In *Ex parte* Chandler, 9 Ves. 35, a separate commission was sued out on the petition of a joint creditor, and the first creditors were permitted to prove, for the purpose of voting for assignees and taking dividends, provided they would pay the separate creditors.

The doctrine afterwards laid down in Barker *v.* Goodair, 11 Ves. 78, is quite decisive upon the question in this case, because it not only, like every case on the subject, admits the equal right of the assignees, as tenants in common, to the joint fund, but it gives to the assignees higher equities than belong to the ordinary tenants in common. Being exposed to the claims of the joint and separate creditors, they have an equity which the solvent partner has not; that is, to compel a contribution from the joint fund. Sir S. Romilly, in that case, observed, *arguendo*, that the assignees, as against the solvent partner, had a lien upon the whole property, until all the accounts were wound up, notwithstanding the tenancy in common. The Lord Chancellor said, that they had equities beyond what mere tenants in common had, and, in the absence of the solvent partner, they could take the joint property, and pay all the joint creditors equally, and apply the surplus under all the equities subsisting between the partners. This, he said, was done every day. Lord Kenyon, in Smith *v.* Stokes, 1 East, 369, had already stated another case, in which the assignees of a bankrupt partner were to take the whole property and sell it, and account to the solvent partner for his share. This was where the property was left in the possession of the bankrupt partner at the time of his bankruptcy.

The rule which Lord Eldon declared to be settled in *Ex parte* Martin, 15 Ves. 114, and *Ex parte* Crew, 16 Ves. 236; and see 475, 476, goes strongly to show, that assignees under a separate commission can now distribute the whole partnership fund, for after a separate commission, a joint commission cannot issue nor, on the other hand, can a separate commission issue after a joint commission. Joint and separate commissions cannot stand together, as they were permitted to do in the time of Lord Hardwicke. Now, by arrangement, one or the

other is superseded, as may best answer the ends of justice. If the separate commission first issued, or by the arrangement was permitted to stand, even if there was a joint commission, it would seem necessarily to follow that it must draw to it the distribution of the whole joint fund, after it had been marshalled upon the principles prevailing in equity.

It is said again, in the case *Ex parte* Taitt, 16 Ves. 193, that Lord Loughborough repeatedly made the order which Lord Eldon has followed, that the account of the joint estate should be taken under the separate commission, and that the assignees should keep distinct accounts, and distribute the joint estate among the joint creditors, and the separate estate among the separate creditors. But the difficulty was, that the account was taken in the absence of the other parties, and though Lord Eldon continued to follow the practice established by Lord Loughborough, yet he was evidently not satisfied with it; and I should rather apprehend that he preferred the rule of Lord Thurlow, allowing the joint creditors to come in fully and take their ratable dividends, and leave it to the assignee to bring the solvent partner into chancery, and have the account of the joint estate taken in his presence, and contribution decreed. He observed afterwards, in Dutton *v.* Morrison, 17 Ves. 191, and see also *Ex parte* Carlson, 18 Ves. 439, that he had continued to follow the practice of his predecessor, and under a separate commission, where the other partners were solvent, he had directed an account of the joint estate to be taken, in the absence even of the other partners; and upon the application of any one joint creditor, the order was, that the joint creditors were to be paid *pari passu*, out of the joint estate, and the residue to be distributed according to the respective interests of the partners. They were likewise entitled to their ratable proportions, if requisite to satisfy their debts, of the surplus of the separate estate.

Upon this review of the cases, I am not able to perceive any colorable reason for the pretension set up by the plaintiff, to the exclusive distribution of the partnership funds. There would be much more ground, upon the established doctrines of equity, for an exclusive right of distribution on the part of the assignees, since under their commission the court is in the practice of directing an account of the joint estate to be taken, and a distribution of that estate ratably among the joint creditors. The most that can be said is, that the solvent partner upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession, and may, as was held in Fox *v.* Hanbury, Cowp. 445, sell those partnership effects, for a valuable consideration and without fraud. They cannot be called out of his possession by his co-tenants, the assignees, unless under the direction of this court, on a bill filed by them for contribution, or, perhaps, where an account of the joint fund is directed to be taken in bankruptcy. But on the other hand, there is no foundation in law or equity for the solvent partner to call to account either

the partnership debtors who have *bona fide* settled with the assignees, or the assignees themselves, for the funds in their possession. They hold those funds by an equal title in law, with him, as tenants in common, and by a superior equitable title, as trustees, charged with the payment of both the joint and separate debts.

I shall accordingly declare that the plaintiff has no right or title, in law or equity, to call the assignees to account for the partnership funds which have been or are now in their possession as such assignees, in order to obtain by decree the possession of those funds for distribution among the creditors of Robert Murray & Co., inasmuch as those assignees have an equal right and title in law, as tenants in common with the plaintiff, and a better right in equity to the possession of those funds for the same purpose of distribution. And further, that the plaintiff has no right to annul or set aside the settlements made by the defendant John B. Murray, as one of the debtors of the house of Robert Murray & Co., with the said assignees, and by the defendants Oliver Kane and Ephraim Bowen, Jr., as executors of John Innis Clark, deceased, also one of the debtors to the house of Robert Murray & Co., with the said assignees, in order to obtain possession of what was due from those debtors respectively, for the purpose of distribution, inasmuch as those assignees had competent power to make those settlements, and to obtain possession of what was due and coming upon those settlements, for the like purpose of distribution. And I shall direct the original bill, and bill of revivor and supplement, to be dismissed, but without costs, considering the special circumstances of the case, and the importance of the points investigated and discussed.

Decree accordingly.

FORSAITH *v.* MERRITT ET AL.

1 Lowell (U. S. Dist. Ct.), 336. 1869.

Bill in equity by the assignee of Charles A. Church, alleging that said Church and Amos M. Farnum, both now of Boston, were copartners doing business in Chicago from December, 1867, to June, 1868; that on the fourth day of the latter month they were insolvent and dissolved their partnership, and on the same day made a conveyance of nearly all their joint personal property to the defendants, George and John Merritt, who were creditors of the firm, and had reasonable cause to believe them insolvent; that within four months afterwards the said Church was declared a bankrupt in this district, upon his own petition, and the complainant has been duly appointed assignee of his estate. The bill made the former partner, Farnum, a defendant, and prayed for an account of the partnership dealings, and that the conveyance may be set aside. The defendants severally demurred to the bill.

W. A. Herrick & W. J. Forsaith, for the plaintiffs.

H. A. Clapp, for the defendant.

LOWELL, J. This is a case of new impression. The plaintiff, who is the assignee of one partner, seeks to set aside a preference given by both to a joint creditor. There is a suggestion of Mr. Justice Story that in some cases the court may require the partner who is not in bankruptcy to deliver up the joint assets, Parker *v.* Muggridge, 2 Story, 334, and JUDGE WARE acted on this intimation and decreed to the assignee the possession of the joint books and accounts which were in the possession of the insolvent partner, who was not a technical bankrupt. Ayer *v.* Brastow, 5 Law Reporter, 498. But I have seen no case which decides that a preference by two partners can be avoided by the assignee of only one of them. A preference is valid at common law and in equity, and is voidable only by the assignee in bankruptcy, and only when the proceedings in bankruptcy are begun within four months, or, according to another section of the statute, within six months after the act is committed; but in this case, the defendant, Farnum, has not become bankrupt, and six months have elapsed, so that it is conclusively settled that there has been no joint preference. Now the assignment does not vest the joint property in the assignee of one partner, and he cannot sue for it without joining the other partner. Eckhardt *v.* Wilson, 8 T. R. 142. It does not dissolve an attachment of joint property theretofore made at the suit of a joint creditor. Fern *v.* Cushing, 4 Cush. 357. The equities of the separate assignee must be worked out through the title of his assignor. The decision of JUDGE WARE was founded on the equity which each partner has, to see that joint creditors are paid *pro rata;* but a partner has no equity to set aside his own conveyances.

I am not dealing with the right of a separate assignee to recover the bankrupt's interest in joint property conveyed by a joint fraud, or to recover his share in a surplus. What I decide is that there was no joint fraud, because a preference is only fraudulent *sub modo* and on condition that the grantors become bankrupt within four or six months, and the bill clearly shows that there was no surplus. If the facts are truly alleged in the bill, the joint creditors should have taken care that both partners were adjudged bankrupt, within the time limited by the statute. As they have not taken this course, I must infer that they did not think it worth their while to interfere with what, in the absence of bankruptcy, is only the payment of a just debt.

So far as the bill seeks an account from Farnum of the partnership affairs, it is demurrable only on the ground of multifariousness, and misjoinder, and may, perhaps, be amended on proper terms, by striking out all other matters after the defendants George and John Merritt have been dismissed.

Demurrer sustained.

JONES ET AL. v. NEWSOM ET AL.

7 Bissell (U. S. C. C.), 321. 1876.

JONES and William McEwen were partners in a banking business at Columbus, from January, 1865, to March 1, 1870. On the latter day Jones withdrew, leaving McEwen in possession, but without any formal dissolution. Shortly afterwards McEwen joined with him his sons, Gideon and Archibald, in the same business and continued it, using the same books that had been used by McEwen & Jones, until September, 1871, when the three McEwens were adjudged bankrupts. The assignees in taking possession of the property and effects of the McEwens, found among them certain choses in action and other personal property known to have been the property of McEwen & Jones at the time Jones withdrew. The firm of McEwen & Jones was insolvent. Jones demanded of the assignees that they should apply this property to the payment of the debts of McEwen & Jones, which they declined to do, but agreed with him to keep a separate account of all the effects of McEwen & Jones and hold them subject to the order of this court. This they have done, and in this cause they appear merely as stakeholders. The bill is filed by Jones and the creditors of McEwen & Jones, to compel the application of the funds of McEwen & Jones, in the hands of McEwen & Sons, to the payment of the debts of McEwen & Jones. Certain individual creditors of William McEwen, who were permitted to intervene, answer, and deny the title of McEwen & Jones and of their creditors, and insist that the title, after the dissolution of that firm and the bankruptcy of William McEwen, and the possession of the assignees under their deed of assignment, was in the assignees, as their trustees, and that no distribution of the fund can be made to the creditors of McEwen & Jones; or, if any, that it can at most only be ratably with them as creditors of William McEwen. Upon this state of facts the master reported a finding for the complainants. The individual creditors of William McEwen filed exceptions to the report.

Baker, *Hord*, *& Hendricks*, and *Herod & Winter*, for complainants.

H. W. Harrington, and *McDonald & Butler*, for the intervening creditors.

GRESHAM, J. William McEwen took the assets in question, clothed with a trust. In equity they belonged to the creditors of McEwen & Jones. William McEwen was the trustee of these creditors, and upon a proper application a court of equity would have compelled him to account to them for the trust property. The individual creditors of a surviving partner who has possession of the firm assets have no right on those assets as against the firm creditors.

The fact that the creditors of McEwen & Jones failed to assert their right to these assets from the time of the virtual dissolution of that firm in March, 1870, until the bankruptcy of McEwen & Sons in September, 1871, cannot be said to amount to laches on their part. There is

nothing in the evidence showing that McEwen & Sons ever paid a cent for these assets or claimed any title to them.

The adjudication of bankruptcy against William McEwen & Sons operated upon the firm and the individual members of it, and transferred into the hands of the law their individual and partnership assets to be distributed to the individual and partnership creditors. Jones was not a party to that adjudication. As already stated, the assets of McEwen & Jones passed into the hands of McEwen, charged with the payments of the debts of that firm. A portion of these assets reached the hands of McEwen's assignees in bankruptcy. That portion is perfectly identified, and the assignees have kept a distinct account of it. The assignees of William McEwen or of McEwen & Sons acquired no title under the deed of assignment to these assets which thus found their way into their possession. Amsinck *v.* Bean, 22 Wall. 395; Holland *v.* Fuller, 13 Ind. 195.

Part of the debts of McEwen & Jones are still unpaid, and those unpaid creditors, or Jones as surviving partner, in their behalf, have a right to the assets in controversy.

Exceptions overruled.

OGDEN *v.* ARNOT.

29 Hun (N. Y.), 146. 1883.

THE firm of William H. Gregg & Co. was composed of William H. Gregg, who conducted the business, and Henry W. Beadle, who was a private banker. On the 22d of March, 1878, Beadle, being insolvent, made an assignment of all his property of every nature to Hall & Gillett, in trust for the payment of his debts. His individual property was insufficient to pay his individual debts.

On the 26th of March, 1878, William H. Gregg, in the firm name, executed a chattel mortgage to the defendant, Arnot, upon all the stock of goods of the firm and the fixtures in their store, to secure $8,070.61 and interest within three months, the mortgages containing a covenant to pay that sum at that time. This sum was for the money loaned to the firm and the goods sold to it. The firm was then indebted to persons other than Arnot. The inventory and schedule of the assignees were filed about April 21, 1878, and do not include the interest of Beadle in the said firm. In April, 1878, Gregg commenced an action against Hall & Gillett, assignees, alleging the partnership aforesaid, and the assignment by Beadle to them, and asking a dissolution of the partnership, the taking of an account, and the appointment of a receiver. Hall & Gillett, assignees, appeared, and by consent of parties, without making Beadle a party, an order was entered May 11, 1878, appointing the present plaintiff, Ogden, receiver of the partnership property of the firm with the usual powers.

On the 16th of April, 1878, Arnot had taken possession of certain whiskey belonging to the said firm, by virtue of his chattel mortgage, and had sold the same. On the 12th of May, 1878, the receiver took possession of the stock other than the whiskey, and while he was inventorying it on the 22d of May, 1878, Arnot took the same under his chattel mortgage and sold it. Thereupon the plaintiff, Ogden, the receiver, in September, 1878, commenced an action against Arnot, Hall & Gillett, asking for relief of various kinds, but substantially seeking to recover for the property taken by Arnot under his chattel mortgage. Subsequently, on the 10th of January, 1881, upon a stipulation of Beadle appearing by attorney, and on motion of Ogden, the receiver, without, so far as appears, any consent of Gregg, the plaintiff in the action, an order was made in the action brought by Gregg against Hall & Gillett, assignees, making Beadle a party defendant therein, and amending the summons and complaint by naming him as a party defendant, and amending the order appointing the receiver by adding Beadle's name as defendant.

Thereafter, on the 10th of May, 1881, the referee, before whom the present action was tried, reported in favor of the plaintiff Ogden against Arnot for $3,437.16 and interest, the value of the stock, not the whiskey, taken by Arnot. On such report judgment was entered and the defendant Arnot appeals.

J. McGuire, for the appellant.

Erastus P. Hart, for the respondent.

LEARNED, P. J. It is not necessary to consider the transaction on which the debts to Arnot arose, because it is plain that they were valid debts owing to the firm by him. Nor is it of any consequence that the mortgage was not recorded.

The assignment by Beadle is in terms broad enough to convey all his property. This did not transfer the *corpus* of the partnership property; but only his share of what would remain after the debts were paid. Menagh *v.* Whitwell, 52 N. Y. 146, at 158. It does not appear by the appeal papers whether the trust was for the payment of individual debts, or of all his debts. But that is of little moment, under the principle just cited. See, in this connection, Wilson *v.* Robertson, 21 N. Y. 587.

It does not seem to be disputed by either party to this controversy that the act of Beadle in assigning his whole property, including, therefore, whatever might belong to him in the partnership, worked a dissolution of the partnership. This must be so; because one partner cannot, against the will of the other, introduce a new member into the partnership. Marquand *v.* New York Manf. Co., 17 Johns. 525; Story on Partn. § 307, etc. Where there is a voluntary dissolution and no agreement as to the settlement of the partnership business, it is plain that one partner has the same power as the other in that respect. But where, as in this case, one partner has broken up the partnership by his assignment in insolvency, it is plain that he has not the right to

manage the closing up of the business. That right belongs to the other party, subject of course to the control of the court, if the right is abused. Story, Partn. 341. Gregg, therefore, had the right to go on with the closing up of the business. It would be most unreasonable if the insolvent partner should, by his insolvency, deprive the solvent partner of the power of closing up the partnership for the payment of the debts of which he is liable. Evans *v.* Evans, 9 Paige, 178; Robbins *v.* Fuller, 24 N. Y. 570; Van Doren *v.* Horten, 19 Hun, 7.

The power to close up the business of the partnership includes necessarily the power to sell the partnership property, to collect the partnership accounts, and to pay the partnership debts. Certainly, then, Gregg could have sold Arnot the stock of goods and the whiskey; could have received the price, and with the price could have paid any partnership debt. The general principle, except as it may be modified by a bankrupt law, is that a debtor may pay one creditor before he pays another; even that he may pay one creditor to the exclusion of the other. And it seems to be settled by decisions that, on the dissolution of the partnership by the death of one partner, or by his insolvent assignment, the remaining partner may exercise that same preference of one partnership creditor over the other. Egberts *v.* Wood, 3 Paige, 517; Loeschigk *v.* Addison, 4 Abb. Pr. N. S. 210. Certainly that must be so, unless the partnership be insolvent; and such insolvency is not shown in this case. If, then, the remaining partner, after such a dissolution, may sell the partnership property, and may apply the avails to such partnership debt as he chooses, it follows that he may directly apply the partnership property to the payment of a partnership debt. The equitable right which the insolvent partner has, or which the representatives of a deceased partner have, is that the partnership property be applied to the payment of partnership debts. That is all; and that right is not infringed by the turning out of partnership property to pay a partnership debt.

In this present case, however, Gregg mortgaged the property to Arnot. Now Gregg had the legal title to the property. He could sell, and convey, and transfer. Why could he not mortgage? Of course a mortgage for his individual and antecedent debt might be invalid; because it would be paying his own debt out of partnership property for no new consideration. But I do not see why he may not mortgage partnership property for a partnership debt. The learned referee argues that he cannot mortgage, because he cannot create, or renew, a partnership obligation. For, he says, the partner thus impairs the right of the creditors to payment of their debts without delay. But when any debtor mortgages his property to secure a just debt, does he impair the right of the other creditors to the payment of their just debts without delay? Of course a creditor may be unable to collect his debt out of mortgaged property, and yet it is lawful for a debtor to mortgage his property for a valid debt, and to make the mortgage payable at a future time. We must remember that this debt to Arnot was a debt of the

solvent Gregg, just as much as it was the debt of the insolvent Beadle. All that Beadle could claim — all that the creditors of the partnership could claim — was that Gregg should use the partnership property to discharge the partnership debts, and not to discharge his individual debts. That he has done.

But it is said that Gregg signed the firm name, and that the mortgage contained a covenant to pay. When Beadle is sued on that covenant, the dissolution of the partnership will be a good defence to the action. But the mortgage is good enough as a transfer of the property, and probably the covenant to pay is binding on Gregg. I think it not accurate to say, in the language of the learned referee, that on the dissolution Gregg immediately became the trustee of the firm property for the benefit of the firm creditors, or for Beadle and his assignees. He was not a trustee, but was the owner of the property. Only in paying from its avails the debts which he himself owed, it was his duty first to pay those which he owed as partner with Beadle. When we speak of a man as trustee, who is not strictly a trustee, we are often led into deductions from the word which may be erroneous. Pars. on Partn. 345. . . .

The judgment must be reversed, new trial granted, referee discharged, costs to abide event.

FERN *v.* CUSHING ET AL.

4 Cush. (Mass.) 357. 1849.

SHAW, C. J. This was a writ of *scire facias* against Daniel Cushing and Sewall G. Mack, as trustees. It appears, by the answers and the facts agreed, that suits were brought, first by Francis Vose, and second by the plaintiff Fern, against Whitney and Blair, and the present defendants as their trustees. . . . The plaintiff's action, though commenced after that of Francis Vose, came to judgment first; and the plaintiffs took out execution, and placed it in the hands of an officer, who duly made demand upon the defendants for the funds in their hands, they having been charged as trustees, and execution awarded in usual form against the goods and effects of Whitney and Blair in their hands. Afterwards, judgment was rendered, in the action of Francis Vose, and execution also awarded against the goods and effects of Whitney and Blair, in the hands of the defendants, — Vose's being the first attachment. This execution was placed in the hands of an officer, and a demand made upon the defendants for the goods and effects of Whitney and Blair in their hands. This occurred on the 24th of March, 1847. On the morning of the same day, the first publication was made of a notice issued by a messenger, upon a proceeding in insolvency, upon the application of Blair alone, after the dissolution of the partnership of Whitney and Blair. It appears

that he did not set forth the insolvency of the firm, but only his own; and the warrant and other proceedings were conducted upon the principle of his several insolvency. The messenger, under this warrant, demanded the funds in the hands of the defendants. Afterwards the defendants paid over the whole balance of the funds in their hands, after deducting the amount which they were allowed by the court to retain for their costs and expenses as trustees, on the execution of Vose, as the first attaching creditor.

The ground on which the plaintiff seeks to charge these defendants as trustees, after they have paid over the entire fund on the execution of the previous attaching creditor, is this: that the plaintiff, by suing out his execution against Whitney and Blair, and causing demand to be made of their effects in the hands of the defendants, had perfected his lien on the fund, so as to place it beyond the risk of being defeated, and having his attachment dissolved by any proceedings in insolvency; but that Vose, though he recovered judgment and took out execution, did not have a demand made on the trustees on his execution until after the first publication of the notice of insolvency, and therefore that his attachment was thereby defeated, and let in the plaintiff as the first indefeasible lien on the fund.

This reasoning is plausible, but, we think, not sound, and not sufficient to give the plaintiff, as second attaching creditor, a priority over Vose, who was the first.

It is not necessary now to decide what act by an attaching creditor is a sufficient taking of the property in the hands of a trustee, so as to prevent a dissolution of the attachment by insolvent proceedings, whether it be the judgment, the issuing of execution, the delivery of such execution to an officer, or the demand by the officer upon the trustee. This decision stands on other grounds.

The insolvent proceedings were against Blair alone. The assignee under these proceedings had no right to take the partnership property, except the share and interest of the insolvent, after the payment and satisfaction of partnership debts. The assignment extended only to the interest of the insolvent partner, in the property and effects of the partnership, after the payment of partnership debts. Pierce *v.* Jackson, 6 Mass. 242; Allen *v.* Wells, 22 Pick. 450; Dyer *v.* Clark, 5 Met. 562; Parker *v.* Phillips, 2 Cush. 175.

The insolvent proceedings, therefore, against Blair did not affect the partnership property attached by Vose in the hands of the trustees, who were indebted to the firm only; and the messenger under these proceedings had no right to the property, and the trustees rightfully paid over the funds in their hands, on Vose's execution, as the prior attaching creditor. Nothing remained to satisfy the execution of the plaintiff. *Judgment for the defendants.*

COREY ET AL. v. PERRY ET AL.

67 Me. 140. 1877.

PLAINTIFFS sued the defendants Perry and Dunn for a debt contracted by them as partners. Perry pleaded his discharge in bankruptcy. The trial court ruled that his discharge did not extend to the partnership debts of Perry & Dunn, and gave judgment against both defendants. Perry alleged exceptions.

G. A. Wilson, for the defendant.

A. J. Blethen, for the plaintiffs.

APPLETON, C. J. The bankrupt law of the United States provides for the discharge of individuals from individual debts and of partners from the debts of the firm. The assets of the individual cannot be diverted from the payment of individual debts to the payment of firm debts, nor can those of the firm from firm debts to the payment of individual debts. The individual estate and its assets and liabilities and the firm estate and its assets and liabilities are kept separate and distinct, so that the creditors of the firm and of the individuals composing it may receive equal and exact justice.

The twelfth rule of the District Court of the United States for the district of Maine is as follows: "Whenever a debtor shall desire to be discharged from his liabilities as a member of a co-partnership, as well as from his individual indebtment, Form No. 1, as prescribed by the rules and orders of the Supreme Court, shall be altered by setting forth therein a description of such firm, with the names and places of residence of the co-partners, and shall pray for the discharge of the petitioner from his liabilities as member of such firm."

The propriety and justice of this rule is apparent. The petitioners for a discharge in bankruptcy should clearly state from what debts they desire to be discharged: if as individuals, that they desire a discharge from individual liabilities; if as members of a firm, that they desire a discharge from partnership liabilities, or from partnership and individual liabilities.

The defendant, James C. Perry, was a member of the firm of Perry & Dunn. In his petition he desired only to be discharged as an individual. He did not set forth that he was a member of any firm. He petitioned for no discharge from his firm debts. He set forth no firm liabilities and disclosed no firm assets. The firm of Perry & Dunn has not been declared bankrupt. It has not been before the District Court sitting in bankruptcy nor within its jurisdiction. Is then the discharge of Perry a discharge from the firm debts as well as from his individual liabilities?

In *Re* William H. Little, 1 Bankr. Reg. 341, Little had been a partner with one Dana, and commenced voluntary proceedings in bankruptcy in his own name. In his schedules the debts and assets of the firm of Little & Dana were mentioned, and the petitioner

prayed to be discharged from all his debts, but fearing that by such proceedings he would not be discharged from the debts of Little & Dana, he asked that his proceedings might be so amended that Dana might be made a party and cited to show cause why the firm of Little & Dana should not be declared bankrupt. Upon this question of amendment, Blatchford, J., says: "Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, and as this petition is one to have the firm declared bankrupt on the petition of its partners, within the provision of § 36 of the act and of general order No. 18, as Dana did not join with Little in his original petition, he ought to have been brought by proper proceedings under general order No. 18, before an adjudication of bankruptcy was made on the petition of Little; the defect is now sought to be remedied by Little. His petition requires to be amended. When he is so brought in, he, Little, can be discharged from the debts of the firm because the theory and intent of § 36 of the act and general orders Nos. 16 and 18 are, that the creditors of a firm shall be required to meet, but once and in our bankruptcy forum, all questions in regard to the bankruptcy of the firm and in regard to debts against the firm." In Amsinck *v.* Bean, 22 Wall. 395, it was decided that the assignee in bankruptcy of the estate of an individual partner of a debtor co-partnership could not maintain a suit to recover hush money previously paid to a creditor of the co-partnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assignee of the firm. So that in this case, the assignee of Perry could not have collected any of the assets of Perry & Dunn. The firm debts should not be discharged when the firm creditors could not possibly have their share of its assets.

The firm assets were never before the bankrupt court. Neither were the firm debts. "It is difficult," remarks Drummond, J., *In re* Noonan, 3 Biss. 491, "to see how any member of the firm can be released from his personal liabilities as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of the firm unless the debts and assets of the firm are considered and adjudicated by the court." The fact that persons have been adjudicated bankrupts as members of one firm is no bar to nor does it defeat a petition against them as partners with others in another firm. *In re* Jewett, 16 N. B. R. 48. In Hudgins *v.* Lane, 11 N. B. R. 463, it was decided that the discharge of a member of a firm upon his individual petition in bankruptcy and without any proceedings by or against the firm, does not discharge such member from the partnership debts. See also Compton *v.* Conkling, 15 N. B. R. 417.

The conclusion is that Perry has not been discharged from his partnership debts.

Exceptions overruled.[1]

WALTON, BARROWS, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

GAVIN, C. J., IN MATTIX *v.* LEACH.

43 N. E. 969: 16 Ind. App. —. 1896.

"APPELLANT claims that John M. Leach's discharge in bankruptcy does not free him from the debt sued on. Whether an individual discharge operates upon firm debts, when the firm has not been brought into bankruptcy, is a much-vexed question, as to which the authorities are in hopeless conflict. Quite a number sustain the negative of the proposition. *In re* Noonan, 18 Fed. Cas. 298; Hudgins *v.* Lane, 12 Fed. Cas. 800; *In re* Little, 15 Id. 598; *In re* Grady, 3 N. B. R. 228; Corey *v.* Perry, 67 Me. 140. In some of these cases the question was only incidentally involved. In the last cited it appeared that the bankrupt did not mention the firm debts in his schedules, nor ask to be discharged therefrom. Other decisions of the same judges, or others following in the line of these, but limiting the expressions used in them, declare that the discharge is effective unless there were partnership assets at the time of the adjudication, and that the burden of showing assets rests upon the creditor. Crompton *v.* Conkling, 15 N. B. R. 417; *In re* Johnston, 17 Fed. 71; *In re* Plumb, 19 Fed. Cas. 886. There are authorities, however, maintaining that the discharge does operate upon partnership as well as individual debts. These we believe to be founded upon better principle. The discharge purports to relieve the bankrupt from all debts provable against him. Firm debts are undoubtedly provable against the individual estate. It is true, they may not, under some circumstances, be permitted to share in the assets until the individual debts are paid; but that does not prevent their being proved, and their holders exercising certain rights allowed creditors. It may be that a firm is abundantly solvent

[1] In Ransom *v.* Wardlaw Co., 27 S. E. 158: 99 Ga. 540 (1896), the court said: "The case arose upon a creditors' petition, under the 'Insolvent Traders' Act' (Code, § 3149a *et seq.*), against a firm of which Ransom, the plaintiff in error, was a member; and, upon the trial of the case, Ransom offered evidence to show that at the time of the filing of the petition, and at all times since, he was solvent, and amply able to pay his own indebtedness and that of the firm; but the court rejected the evidence, and this is complained of in the motion for a new trial, the movant insisting that a firm is not insolvent as long as either of its members is solvent, and that no creditors' petition will lie unless the firm is insolvent by reason of the insolvency of its members. The court did not err in refusing to admit such evidence. Although the partners, as individuals, may be perfectly solvent, the firm, as such, may be insolvent. Drucker *v.* Wellhouse, 82 Ga. 135."

when the adjudication is made, so that there is no cause to bring it into bankruptcy, or it might be that the individual is insolvent merely by reason of the deficit of partnership assets. As it seems to us, the firm debts are fairly within the purview of the statute and the discharge. Judge Lowell, in Wilkins *v.* Davis, 15 N. B. R. 60, discusses the question elaborately, collates the authorities, and sustains his decision by sound logic. The majority of the court is of the opinion that the ends of justice will be subserved by directing a new trial.

"The judgment is accordingly reversed, with such direction."

RUSSELL ET AL. *v.* COLE.

167 Mass. 6 : 44 N. E. 1057. 1896.

TORT by Russell & Martin, co-partners, for the conversion of firm property. Defendant, a deputy sheriff, justified under a writ against Martin, on which he attached the property. The attachment was issued on the ground of Martin's insolvency. Before this action came to trial, Martin had been declared insolvent and the defendant had surrendered the property in question to Martin's assignee. This property had been Martin's separate estate, until it was transferred to the firm of Russell & Martin, on August 31, 1893. The attachment was levied a few hours after the partnership was formed. Verdict for the plaintiffs for the full value of the goods. Defendant alleged exceptions.

C. H. Sprague, for the defendant.

C. A. De Courcy & W. Coulson, for the plaintiffs.

KNOWLTON, J. The conveyance by Martin to Russell was, on the part of Martin, fraudulent as against creditors, and in contravention of the statute relating to insolvency. But Russell had no knowledge of this fact, and did not in any way participate in the fraud. The contract, therefore, took effect according to its terms. Russell became a co-partner with Martin, and the goods sold became partnership property. The rights of Russell, who bought in good faith, for a valuable consideration, were not in any way affected by the fraud of Martin, of which he was ignorant. The property which thus became assets of the partnership under the contract could not afterwards be attached on a debt against one of the partners, and the defendant, as attaching officer, acquired no valid title. Sanborn *v.* Royce, 132 Mass. 594; Pelletier *v.* Couture, 148 Mass. 269-271.

The action was rightly brought in the name of both members of the firm, notwithstanding the proceedings in insolvency against Martin. Fish *v.* Gates, 133 Mass. 441; Fay *v.* Duggan, 135 Mass. 242; Hyde *v.* Food Co., 160 Mass. 559. The fact that Martin was guilty of a

fraud in forming the partnership before the attachment was made does not prevent the maintenance of the action. The principle of the decision in Homer *v.* Wood, 11 Cush. 62, is not to be extended to cases like the present. As, according to the finding of the auditor, the goods became partnership property even as to creditors, notwithstanding the fraud of Martin, the suit against the defendant for attaching them wrongfully does not involve any question in regard to the right of Martin to rescind or repudiate the contract, nor bring his previous conduct within the issue. The defendant's act in attaching the partnership property was a trespass, and the owners of the property or parties in possession of it might sue for damages without regard to the question whether one of them, in a prevous transaction, had been guilty of a wrong against third parties. Hall *v.* Corcoran, 107 Mass. 251; Newcomb *v.* Protective Department, 146 Mass. 596–602; Stillings *v.* Turner, 153 Mass. 534.

The remaining question in the case is whether the defendant is entitled to show, in mitigation of damages, that he delivered the property to the assignee in insolvency of Martin. After the commencement of the proceedings in insolvency, Russell alone had a right to the possession of the property. The assignee of Martin was only entitled to a share in the surplus of the partnership assets, if anything remained after paying the debts. The partnership, being solvent, through the solvency of the partner Russell, was not brought into the court of insolvency, and that court acquired no jurisdiction to settle its affairs. It is to be remembered that our courts of insolvency are creatures of the statute, and that they have no jurisdiction except that which the statute gives to them. Their only jurisdiction over partnerships is conferred by Pub. St. c. 157, § 120, *et infra.* It is only "when two or more persons who are partners become insolvent" — that is, when the partnership is insolvent through the insolvency of all the members of the firm — that a court of insolvency acquires jurisdiction to settle the affairs of the partnership; and in such a case a warrant is issued upon which the joint stock and property of the firm and the separate estate of each of the partners is taken. Until the enactment of St. 1894, c. 164, courts of insolvency had no jurisdiction in equity, and that statute confers no jurisdiction to interfere in the affairs of a partnership which is not brought into the court of insolvency by regular proceedings by or against it, except in cases where incidentally to the proceedings in insolvency there is a ground for equitable relief under the principles which govern other courts of equity.

When a partnership is dissolved by the death or insolvency of one of its members, the surviving partners in case of death, or the solvent partners in case one of the firm is in insolvency, are entitled to the possession of the partnership property, and are bound to pay all of the firm's debts. It is their duty to wind up the affairs of the partnership, and to pay over to the representative of the deceased or

insolvent partner his share of the assets, if there are any after paying the firm's liabilities. Hanson *v.* Paige, 3 Gray, 239–242; Dearborn *v.* Keith, 5 Cush. 224; Fern *v.* Cushing, 4 Cush. 357; Cunningham *v.* Munroe, 15 Gray, 471–479; Nutting *v.* Ashcroft, 101 Mass. 300; Pelletier *v.* Couture, 148 Mass. 269, 271; Amsinck *v.* Bean, 22 Wall. 395; 2 Lindl. Partn. 2d Am. ed. 669 *et seq.* If they fail to do their duty in these particulars, the executor, administrator, or assignee may have a remedy in a court of equity. So long as the solvent partners are ready and willing properly to settle the business and dispose of the property of the partnership, and properly to account for and pay over the proceeds, an assignee in insolvency, under our statute, has no right to the possession of the partnership property. The partnership property and the solvent members of the firm are not within the jurisdiction of the court of insolvency. They can be brought within its jurisdiction only upon proceedings in equity, under St. 1894, c. 164, founded upon facts which would give jurisdiction to a court of general jurisdiction in equity. Some of the dicta in Wilkins *v.* Davis, 15 N. B. R. 60, 2 Low. 511, are not in accordance with the decisions and practice under the statutes of Massachusetts. It follows that the surrender of the property by the defendant to Martin's assignee in insolvency was irregular and unauthorized. It cannot avail the defendant as a defence in this action, by way of mitigation of damages or otherwise. In the opinion of a majority of the court, the plaintiff Russell was entitled to have from the defendant all of the property taken under the attachment; and, it not having been returned to him, he may recover the full value of it.

Exceptions overruled.

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§ 4. Order of Proofs and Marshalling.

MILLER'S RIVER NAT. BANK *v.* JEFFERSON.

138 Mass. 111. 1884.

Holmes, J. The Miller's River National Bank discounted a draft of the firm of Goodman, Schofield, & Company, consisting of Goodman, Hale, and Schofield, who are now in insolvency individually and as a firm. As a condition of making the discount, the bank required security to be given for the whole indebtedness of the firm to it, including previous advances as well as the draft. Goodman and Hale accordingly transferred to the bank promissory notes of the firm owned by them respectively, and given for advances made by them to the firm. These notes were all payable on demand. The discounted draft had been paid before the insolvency proceedings were begun, but some of the previous advances had not been; and the question is, whether the

bank can prove the collateral notes, after having already proved for the whole amount of the unpaid advances.

The statutes and decisions have applied the maxim that equality is equity, in a somewhat mechanical way, to the distribution of insolvent estates. But we know of no authority applicable to this case that goes beyond preventing parties from taking a larger proportion of the fund than they or those whom they represented may be supposed to have contributed to it. If the principal and the collateral claim represent two distinct contributions, there is nothing in the general policy of the insolvent law opposed to double proof. If, for instance, a stranger to the firm had held these notes for advances made by him, and had pledged them to the bank to secure it for its subsequent advance, the pledged notes, being provable before, would not cease to be when pledged, and the pledgee would hold any balance received above its debt as trustee for the pledgor.

In the present case, the collateral notes represent distinct contributions as much as in the case just supposed, — contributions from members of the firm, to be sure, who are liable *in solidum* for the firm debts, but still contributions diminishing their separate estates and swelling that of the firm. Even in the hands of a partner, they would be recognized as debts, and although the partner would not be allowed to prove them in competition with his own creditors, if there were a surplus he would be let in, and, according to many decisions, would have to be paid in full before any dividend could be paid in respect to capital.

This being so, what substantial reason is there why a holder for value should not receive dividends to the extent of his interest, like a pledgee of accommodation paper? It is true that the consideration which gives this particular debt its capacity to compete with the claims of other creditors is the advance to the firm, and that that advance has already been proved to its full amount. But if the bank had made a separate purchase of these notes, it could prove them, although such a purchase would add nothing to the fund appropriated to the firm creditors. In this case, the bank is equally a holder for value, and the transfer of the collateral notes was part of the consideration for the advance to the firm.

Again, at the time the notes were transferred to the bank, the bank could have maintained an action upon them. Thayer *v.* Buffum, 11 Met. 398; Richards *v.* Fisher, 2 Allen, 527. Without implying that the right to maintain an action and the right to prove in insolvency are co-extensive, it may be said that one follows from the other pretty directly when the general policy of the insolvent laws has been satisfied.

The fact that the notes were payable on demand makes no difference. Section 14 of the Pub. Sts. c. 77, no more subjects indorsees to a partner's disability to prove, than it does to his disability to sue. Thayer *v.* Buffum, and Richards *v.* Fisher, *ubi supra.*

If the obstacles to proving the collateral notes, considered as con-

tracts of the firm, are overcome, we do not understand the defendant to argue that they present any further difficulties in their aspect of securities, or to deny that a creditor holding security from one partner, like one holding it from a stranger, may retain his security, and prove for the full amount of his debt.

Judgment for the plaintiff.

ROGER WILLIAMS NAT. BANK *v.* HALL ET AL.

160 Mass. 171. 1893.

HOLMES, J. The question in this case is whether the holder of a partnership note made payable to one partner, and indorsed by him to the holder, can prove it in insolvency against the estates of both of the firm and of the indorsing partner before any dividend is declared on either. The statute is silent. Intimations in favor of the right of double proof are to be found in Borden *v.* Cuyler, 10 Cush. 476, 477; and in Mead *v.* Nat. Bank, 6 Blatch. 180, and in the decisions *In re* Farnum, 6 Bost. L. R. 21 (by Judge Sprague), and *Ex parte* Nason, 70 Me. 363. The United States Bankrupt Act of 1867, § 21, U. S. R. S. § 5074, is construed to allow the right in terms. Emery *v.* Canal Nat. B'k, 3 Cliff. 507, collecting the cases, and repeating some of the general arguments at length.

Formerly an arbitrary rule was worked out by degrees in England that the creditor must elect. *Ex parte* Rowlandson, 3 P. Wms. 405; *Ex parte* Moult, Mont. 321; Goldsmid *v.* Cazenove, 7 H. L. C. 785. But this rule, after being disapproved by the most eminent judges, *Ex parte* Bevan, 9 Ves. 223: 10 Ves. 107; Story on Partn. 7th ed. §§ 384–386; Eden on Bank. 2d ed. 131, has been done away with by statute in cases like the present. *Ex parte* Honey, L. R. 7 Ch. 178. In view of the modern decisions, and the general agreement of opinion, we think it unnecessary to argue elaborately for the right of a creditor who had required two contracts, binding two distinct estates, to insist upon both. See further Fuller *v.* Hooper, 3 Gray, 334; Vanuxem *v.* Burr, 151 Mass. 386; Turner *v.* Whitmore, 63 Me. 526; Miller's River Nat. Bk. *v.* Jefferson, 138 Mass. 111.

Decree of Court of Insolvency affirmed.[1]

[1] In *Ex parte* Nason, 70 Me. 363, the court said: "We have no hesitation in adopting the doctrine of the federal courts upon this question, and if the question was untouched by authority we do not see how a contrary conclusion could logically be reached. A joint and several note contains in one instrument two contracts, separate and distinct from each other. The makers promise as a firm and also as individuals. In a legal sense, the parties to the two contracts are not the same but different parties. The parties meant something by this form of double contract. The holder intended to have a security upon more than one estate. The presumption is that the creditor would not have paid the consideration he did, had it not been upon the expectation of a double security."

HILL ET AL. v. CORNWALL & BRO.'S ASSIGNEE ET AL.

95 Ky. 512: 26 S. W. 540. 1894.

PRYOR, J. In the month of March, 1891, Cornwall & Bro. made an assignment for the benefit of creditors, and each member of the firm also made an individual assignment for the same purpose. The firm was composed of William Cornwall and his two sons, William Cornwall, Jr., and Aaron W. Cornwall. The business of the firm was the manufacture of soap and candles, and, being largely indebted, individually as well as partners, many questions have arisen touching the character of the assets, and the mode of payment or distribution of the trust fund between creditors. The Louisville Trust Company was made the assignee, and filed this petition below, asking advice as to the administration of the several trusts, and for a final settlement of its accounts as assignee. . . .

On the appeal of the Merchants' National Bank, a creditor of the firm of Cornwall & Bro., the question as to the right of the bank to make double proof arises; that is, its right to prove the debt not only against the firm of Cornwall & Bro., but also against the individual assets of William Cornwall, Sr., William Cornwall, Jr., and Aaron Cornwall, all three of whom constituted the firm of Cornwall & Bro. It is said (and this is true) that there was not a joint assignment of both partnership and individual property, but separate assignments, first by the partnership, and then separate assignments by each member of his individual estate; and the question asked is, who are the *cestuis que trustent* in these several deeds? and the answer must be that all the creditors are the beneficiaries in each deed. But the question again arises, how are the assets from each assignment to be distributed between partnership and individual creditors? We can perceive no distinction between a joint assignment, where the firm assets and the individual assets are assigned, and the case where each make separate assignments. The equitable rule is the same, and must be applied in the same way. It is conceded that, at law, firm creditors have no lien upon the firm assets, and no contract right by which an individual creditor must stand aside until the partnership creditor is satisfied, but a court of equity gives to the firm creditor a lien through the partners, who have the right to demand the payment of firm debts before the partnership property can be applied to the individual debt of one of the partners; and this rule of equity giving the creditor of the firm priority over the individual creditor as to the firm assets was so extended by this court in the case of Bank v. Keizer, 2 Duv. 169, as to compel the creditor who elects to accept the benefit of this equitable rule to remain still until the individual creditor, out of the individual assets, is made equal with him. Counsel for the bank have cited many authorities in other States, including those from the federal judiciary, establishing a different doctrine, and present with much force a line of

reasoning sustaining their view of this equitable doctrine. The rule in the case of Bank *v.* Keizer has been followed or recognized in this State in several reported cases, viz.: Whitehead *v.* Chadwell, 2 Duv. 432; in the case of Spratt's Ex'r *v.* Bank, reported in 84 Ky. 85; and that of Bank *v.* Kenney, reported in 79 Ky. 133. It was not intended in the last-named case to depart from the doctrine as settled in Bank *v.* Keizer, and for the reason that, if an equity is created or flows from a rule of right that gives one set of creditors priority in the payment of debts out of one class of assets, those who are required to look for payment to another and different class of assets should at least be made equal before those electing to take this priority should share in the general distribution.

A joint and several liability may afford an equitable reason for giving a lien, or rather priority, to the partnership creditor in the distribution of the partnership assets, but he may elect not to assert this claim, but share with the individual creditor in the distribution of the entire assets; and to give the firm creditor priority in the first place, and then allow him to share with the individual creditor in the distribution of the individual assets, is neither equitable nor just. The firm creditor in fact credits the firm; and, while each member is individually liable also, the creditor is not allowed his priority because he has taken the precaution to have all the firm bound, but for the reason the partners have the right to have the firm assets applied to the payment of the partnership debts. The equity of the creditor comes in this way, and equity must come to the relief of those who are required to look on until the firm creditor has been paid. We adhere to the rule as settled by this court, however high the authority elsewhere. . . .

GIBBS *v.* HUMPHREY.

91 Wis. 111 · 64 N. W. 750. 1895.

On the 5th day of November, 1891, Alfred J. Goss and J. D. Putnam were, and had been continuously for some years prior thereto, doing a milling business as co-partners under the firm name of J. D. Putnam & Co. at River Falls, Pierce County, Wis. On the day particularly named the partnership was dissolved, and it was agreed that the business should thereafter be continued by J. B. Goss, as J. B. Goss & Co., and that he should assume all the liabilities of the old firm, and have the firm assets. Pursuant to the aforesaid agreement, the partnership property was conveyed to J. B. Goss, being first transferred to A. J. Goss, but for what reason does not clearly appear, and by him to J. B. Goss. Immediately after the dissolution of the old firm, the parties caused the following notice thereof, and of the fact that the business would thereafter be conducted by J. B. Goss & Co., to be pub-

lished in the local paper: "Notice is hereby given that the co-partnership formerly existing between the undersigned, J. D. Putnam and Alfred J. Goss, under the firm name of J. D. Putnam & Co., is this day dissolved by mutual consent, and the business will in future be carried on under the firm name of J. B. Goss & Co., who will settle all claims of the late co-partnership. November 3d, 1891. [Signed] J. D. Putnam. Alfred J. Goss." The business was thereafter conducted without any information to the public of a change in the members of the firm, except such as was contained in the published notice, till June, 1893, when A. J. Goss, who was the proprietor of a bank at Hudson, Wis., failed, and J. B. Goss also failed. Each made an assignment for the benefit of creditors, — the former to H. L. Humphrey, the respondent. At the time of such failures J. B. Goss was indebted to A. J. Goss, at the bank, to the amount of $45,000, which included a large amount of old firm indebtedness, existing at the bank at the time of the dissolution, and thereafter assumed by J. B. Goss, and the balance was for money loaned by A. J. Goss to enable the former to carry out his agreement to assume and pay the J. D. Putman & Co. debts, and to carry on the business. J. B. Goss was a son of A. J. Goss, and was not supposed at any time to be the owner of much property or means of any kind, but the father, up to the time of the assignment, was supposed to be very wealthy. Substantially all the creditors of the old firm, and also of J. B. Goss & Co., prior to the assignment, supposed that A. J. Goss was a member of the new firm. Defendant filed a claim, in the assignment proceedings of J. B. Goss, for the indebtedness of J. B. Goss & Co. to his assignor.

Spooner, Sanborn, Kerr, & Spooner, for appellant.

F. M. White, for respondent.

Marshall, J. The question here presented is, can the appellant, representing the claim of his assignor, prove up such claim in competition with the other creditors who dealt with J. B. Goss as J. B. Goss & Co.? The trial court found that, as between A. J. Goss and the creditors of J. B. Goss, the two, by reason of holding out, must be considered as partners under the name of J. B. Goss & Co.; that A. J. Goss and his assignee, by reason of the facts, are estopped from setting up to the contrary. The conclusion reached by this court in Thayer *v.* Goss, *ante*, 90, is conclusive in favor of the finding of the court below on this point. The published notice of dissolution was not only not notice that A. J. Goss had retired, but from it all persons had a right to assume that he occupied the same position in the new firm of J. B. Goss & Co. that he did in the old firm of J. D. Putnam & Co. Respondent relies upon the notice of dissolution, and change of the firm name. In Thread Co. *v.* Wortendyke, 24 N. Y. 550, where the precise question was presented in respect to a similar notice, the rule was stated as follows: "When notice of change of firm name is relied upon to exonerate a retiring partner, such change must show that he has withdrawn from the business. A change not indicating this is in-

sufficient to put dealers upon inquiry. They may safely assume, until they have notice to the contrary, that all the former partners, not apparently affected by the change of name, yet remain in the business." Numerous authorities might be cited to sustain the rule thus stated, and we venture the assertion that no reputable authority can be found to the contrary.

The general rule is that the individual partner cannot himself prove against the joint estate in competition with creditors of the firm. Colly. Partn. § 921; Burrill, Assignm. § 179; Peters *v.* Bain, 133 U. S. 670. This is upon the ground that he himself is liable to the firm creditors, and cannot be permitted to diminish the firm assets to the prejudice of those who are not only creditors of the firm but of himself. Lindl. Partn. 721. In case of an ostensible partnership where there is a general holding out, as in this case, the same reasoning will necessarily apply. The ostensible partner is liable to the firm creditors the same as if he was a partner in fact. There is no difference. *In re* Rowland, 1 Ch. App. 421; *Ex parte* Hayman, *In re* Pulsford, 8 Ch. Div. 11. Therefore, neither A. J. Goss nor his assignee can come in and prove against the ostensible firm of J. B. Goss & Co., and diminish the assets to the prejudice of those who are not only creditors of such ostensible firm, but of A. J. Goss himself.

The rule as stated is conceded by appellant's counsel, but they urge the exception, well known to and recognized by the English courts, that, "when one or more members of a firm carry on a distinct trade, proof will be admitted between the estate of the general and the particular firm, *pari passu* with all the creditors, in all cases where the debt has arisen from goods furnished by one firm to the other, in a manner as if they had been utterly unconnected in trade; but that, except in the case of bankers, this rule will not be applicable when the debt has arisen only from money advanced by one firm to the other." Colly. Partn. § 1004, and cases cited. The learned circuit judge found that the debt did not accrue from the loan of money by A. J. Goss in the regular course of his separate business, and in a manner as if such separate business was entirely unconnected with the business of J. B. Goss & Co., but that the whole indebtedness accrued in an effort to wind up the old business of J. D. Putnam & Co.; and this finding is fairly supported by the evidence. It follows that a discussion of the question of whether the exception to the general rule mentioned is recognized in this country would be needless, and that the order appealed from should be affirmed.

The order appealed from is affirmed.

McCRUDEN *v.* JONAS ET AL. YETTA GREENBOUM'S APPEAL.

173 Pa. St. 507: 34 At. 224. 1896.

McCollum, J. The fund for distribution was created by a receiver's sale of the property of the Parisian Cloak & Suit Company. It is not sufficient to pay the debts of the company in full, and we are therefore required to consider and determine on this appeal whether Yetta Greenboum is entitled to participate in it on the footing of the other creditors. To substantiate her claim that she is, she presents three notes made by the Parisian Cloak & Suit Company on the 15th of April, 1893, to the order of I. Jonas & Co., from whom she received them, duly indorsed as collateral security for their pre-existing indebtedness to her. It is conceded that the notes present a *bona fide* indebtedness of the makers to the payees, and that she has, by virtue of them, the same rights in the distribution of the fund in question that they gave to the parties to whose order they were drawn. In order to make her position in the distribution clear, it is necessary to state the material facts affecting it, and these are as follows: The place of business of I. Jonas & Co. was in Chicago, Ill., and that of the Parisian Cloak & Suit Company was in Pittsburg, Pa. All the members of the firm of I. Jonas & Co. were members of the Parisian Cloak & Suit Company, and liable for the debts of the latter as well as for the debts of the former. In the latter there was but one person who was not a member of the former, and he was not intrusted with the management of the finances of his firm, nor authorized to sign bills and notes for it. These powers were vested in the other members of his firm, who, as we have seen, constituted the partnership of I. Jonas & Co. William Greenboum, the husband of Yetta Greenboum, was a member of both firms, and after his death in October, 1891, their daughter, Mrs. Estella Sommers, purchased the interest of his estate in each of them, and thenceforth possessed and exercised the rights and powers in the management of them that he had and exercised in his lifetime. Isador Jonas was a son-in-law of Mrs. Yetta Greenboum, and, as she had a daughter and son-in-law in each firm, it is not surprising that she had the knowledge respecting the management and status of both firms that she evinced in her deposition. As she was a creditor of I. Jonas & Co., and held the notes of the Parisian Cloak & Suit Company as collateral security for their debt, she was interested in acquiring this knowledge, and her possession of it may have had some connection with the fact that she did not accept the notes in payment or satisfaction of the debt which the payees therein owed her. Two of the notes were expressly payable at the store of the makers, in Pittsburg, and the other was impliedly so. True, the place of payment was not named in it, but the omission to name it was, under the circumstances surrounding the transaction, presumably an

inadvertence. The notes were made and dated at the same time and place, with the same purpose in view; and they were promptly passed by the payees to their creditor, who knew that the place of business of the makers was in Pittsburg. It is said in volume 2, p. 328, Am. & Eng. Enc. Law, that, "If no place of payment is named in the note, it is understood to be the place of residence of the maker," and that "It cannot be presumed that the place of payment is the place of date, though some cases hold that, in the absence of any express provision on this point, the intent was, *prima facie*, to pay where the note was made." In Oxnard *v.* Varnum, 111 Pa. St. 193, it is said that "the making and dating of a note at a particular place are not equivalent to making it payable there;" but it is proper to state that the action was by the second indorsee against the first indorser, and involved the duty of the holder in regard to presentment and demand at the residence or place of business of the maker. If, however, there is a presumption that, in the absence of an express provision on the subject, the place of date is the place of payment, we agree with the learned auditor and the learned court below that it cannot prevail against the facts and circumstances connected with and surrounding the execution and delivery of the note in question. We conclude, therefore, that Mrs. Greenboum occupies no higher ground in the distribution than I. Jonas & Co. would have occupied had they retained the notes, and that her claim upon the fund must be passed upon in accordance with the laws of Pennsylvania governing the distribution of the assets of an insolvent partnership.

The learned court below, in awarding to Mrs. Greenboum the balance of the fund remaining after paying thereout the claims of the other creditors in full, gave her all that she was entitled to, and all that the parties to whose rights she succeeded could possibly have received from it. As they were liable for all the claims of the other creditors, they could not have participated in the distribution until those claims were satisfied. This is a proposition in accordance with equity, and well sustained by the decisions of this court. Erb's Appeal, 2 Pen. & W. 296; Himes *v.* Barnitz, 8 Watts, 39; Worrall's Appeal, 41 Pa. St. 524; and Datesman's Appeal; 77 Pa. St. 243. There is nothing in the act of April 14, 1838, which sustains the contention that an insolvent partnership, composed of three of the four members of another insolvent partnership, can, as a creditor of the latter, share equally with its other creditors in the distribution of its assets. This act has been severely and justly criticised in most, if not all, of the cases in which it has been considered, but it has never yet produced such results as are contended for in this case. Tassey *v.* Church, 6 Watts & S. 465; Pennock *v.* Swayne, Id. 239; and Allen *v.* Erie City Bank, 57 Pa. St. 129.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

IN RE NORMAN B. FOOT ET AL.

12 Nat. Bankruptcy Reg. 337. 1875.

WALLACE, J. For the purpose of raising money for the firm of Foot, Doud, & Co., the above-named bankrupt, Foot, one of the firm, indorsed their paper, and pledged securities belonging to himself individually as collateral for payment of the paper. After the adjudication of bankruptcy herein the holders of the notes sold the securities thus pledged, and realized upon the sale the sum of eighteen thousand two hundred and eighty-one dollars, being one hundred and four dollars in excess of the amount due upon the notes. The separate creditors of Foot now represent that his separate estate is insufficient to pay his individual debts, and insist that the amount realized from the securities thus sold be appropriated from the fund belonging to the joint estate to that of the separate estate of Foot. They maintain that it was the duty of the assignee in bankruptcy to have exonerated the separate estate from the lien of the pledgees out of the funds of the joint estate; and they urge, that in any event, Foot, as surety for the firm, when the notes were paid by the sale of his property, became subrogated to the claims of the holders of the notes, and entitled to prove the amount of the notes against the joint estate, and that this demand enures to the benefit of his separate estate, which should be credited by the assignee with ratable dividends on the amount.

There are technical difficulties in the way of obtaining relief upon either of these theories. The assignee would not have been justified in applying the moneys of the joint estate to discharge a lien upon the property of the separate estate, even where the lien was created for the benefit of the firm; and if Foot as surety became subrogated to the rights of the holders of the notes, and therefore entitled to prove their amount, the rule which precludes a partner from proving his individual debt in competition with the joint creditors would defeat the separate estate from deriving any benefit through the claim of Foot. But it seems clear that the equities of the separate creditors can be worked out upon familiar principles, and a result attained, which, in view of the condition of the two estates, is highly desirable.

Where there are two classes of creditors having a common debtor who has several funds, and one class of creditors can resort to all the funds while the other can resort only to part of them, the former shall take payment out of the fund to which they can resort exclusively, so that both classes may be protected; and if the former resort to the fund common to both classes, to the loss of the latter, the latter are entitled to be substituted to the extent of the deprivation to which they have been subjected in the place of the former. This principle has been frequently applied where specific liens exist in favor of different creditors upon property of the same debtor; and the rule is the same where the parties are creditors of different debtors, where as between

the debtors equity demands that one of them should discharge the debt in exoneration of the other. Dorr *v.* Shaw, 4 Johns. Ch. 17; Story Eq. §§ 642, 643; *Ex parte* Kendall, 17 Ves. 513; Neff *v.* Miller, 8 Barr, 347; Stirling *v.* Brightbill, 5 Watts, 229. The doctrine applies in all cases of marshalling equitable assets; and its application to assets in bankruptcy, which are to be administered upon equitable principles, is peculiarly appropriate.

In the present case, after the adjudication of bankruptcy the holders of the notes might have surrendered the collaterals and resorted to either of the funds to obtain payment; as creditors of the firm they could have proved against and shared in the joint estate, and as creditors of Foot they could have proved against and shared in his separate estate; and if they had surrendered, the collaterals would have enured to the benefit of the separate estate, because the firm were the primary debtors and Foot was a surety. The holders of the notes could not have been compelled to elect as to which fund they should pursue, the rule in England, which requires creditors both of the joint and separate estate in bankruptcy to elect, not obtaining here. *Ex parte* Farnum, 6 Bost. L. Rep. 21; Meade *v.* Nat. Bank of Fayetteville, 2 N. B. R. 173; Emery *v.* Canal Nat. Bank, 7 N. B. R. 217. The joint creditors therefore could not have been heard to complain if the holders of the notes had chosen to obtain satisfaction out of the joint estate, and no equities exist on their part to countervail these of the separate creditors of Foot. On the other hand, if the holders of the notes had surrendered their collaterals and resorted to the separate estate of Foot by proving their claims in bankruptcy, the creditors of his separate estate would have been entitled to be substituted in the place of the holders of the notes, and allowed to prove the notes against the joint estate.

The rights of the parties are not changed because the holders of the notes satisfied them by a sale of the securities, instead of resorting to the joint estate in bankruptcy. By the course taken the separate estate has been diminished to the extent that satisfaction might have been obtained from the joint estate, and to that extent the separate creditors have been deprived of a fund to which they were entitled to equitable priority, as against a class of creditors who had resort to another fund, which was, as between the debtors, the primary fund for payment. Upon the principles referred to, the separate creditors are to be substituted to the rights of the holders of the notes to enforce payment from the joint estate in bankruptcy. The technical satisfaction of the notes by the proceeds of the sale of the securities does not stand in the way, for payment will not be permitted in equity to operate as an extinguishment as against those equitably entitled to substitution in the place of the party receiving payment. Eddy *v.* Traver, 6 Paige, 521; Morris *v.* Oakford, 9 Barr, 498; Richardson *v.* Washington Bank, 3 Met. 536.

Applying these principles to the present case, a result is reached which does no injustice to either class of creditors, and which affords a

signal illustration of the benign vigor of the rules of equity. The assets of the primary debtors will be appropriated to the ratable payment of all their creditors, and those of the separate partner to his creditors; while the holders of the notes, protected in the exercise of their rights, will have so enforced them as not needlessly to prejudice the rights of other creditors.

A decree is ordered, that the assignee appropriate to the separate estate of Foot the surplus arising upon the sale of the securities, and such further sum as may arise from the dividends of the joint estate, as upon a debt proved against such joint estate of eighteen thousand one hundred and seventy-seven dollars accruing as of the date of the sale of the securities.

HAINES & CO.'S ESTATE. GROVE'S APPEAL.

176 Pa. St. 354: 35 At. 237. 1896.

WOOD, Brown, Henderson, Jenkins, Crowe, Harper, and Wilson were partners in Philadelphia, in the firm name of Wood, Brown, & Co. Wood, Brown, Haines, Bacon, and Whittaker formed a limited partnership under the name of Granville B. Haines & Co.; Bacon and Whittaker were the special partners.

In March, 1894, both firms made assignments for the benefit of creditors. It was then discovered that Wood and Brown, without the knowledge and consent of their partners in either firm, had appropriated to the use of Haines & Co. $175,000 of cash and merchandise belonging to Wood, Brown, & Co. This had been accomplished and concealed by means of a series of fictitious entries in the books of both firms, the effect of which was that the $175,000 continued to appear as an asset on the balance sheets and reports to commercial agencies of Wood, Brown, & Co., while in reality it had been incorporated into the assets of Haines & Co. For this $175,000 the assignee of Wood, Brown, & Co. made claim against the estate of Haines & Co.

The auditor rejected this claim on the ground that the two firms were practically one. This was confirmed by ARNOLD, J., and the assignee of Wood, Brown, & Co. appealed.

P. Prichard, *J. G. Johnson*, and *G. L. Crawfor*, for appellant.

Geo. P. Rich, *H. C. Boyer*, *C. Biddle*, *W. R. Smith*, *G. T. Bispham*, *W. S. Divine*, and *S. B. Huey*, for various appellees.

MITCHELL, J. (after deciding that the two firms were distinct partnerships). It is urged that the assignee (appellant) is not entitled to prove against the fund until the accounts between the partners of Wood, Brown, & Co. shall have been settled, and then only for the amount that may be found due to the partners other than Wood and Brown; in other words, that Wood and Brown, being partners in the debtor firm, cannot be creditors also of that firm as against other

creditors. But this argument overlooks the effect of the insolvency of Wood, Brown, & Co. The moment that fact is ascertained, the creditors acquire a right to all the assets of that firm, among which, undoubtedly, is their claim against Haines & Co. If Haines & Co. were solvent, there could be no question of the validity of this claim. Although Brown and Wood might be creditor partners, the right would be in the creditors of Wood, Brown, & Co., as a firm, without reference to the status of the individual partners in either firm among themselves. And the insolvency of Haines & Co. does not change the rights of Wood, Brown, & Co.'s creditors. As to their respective creditors, the two firms are separate and distinct entities, and the assets of each are a separate fund for its own creditors, just as the firm assets and the individual property of the partners are separate funds for partnership and individual creditors in ordinary cases, although the partners are equally debtors to both. Each class has a prior claim on its own fund, and only a secondary or postponed claim on the other after the latter's preferred creditors are satisfied.

The validity of the appellant's claim on its merits is also attacked. It is doubtful if any such question is really before us, as there was no exception on this subject in the court below, and, of course, there is no complaint by the appellant. But, to avoid all further difficulty, it may as well be disposed of. The auditor finds that "the right of Wood, Brown, & Co. to recover back the $75,000 paid in as the capital of Wood and Brown, and the further question of the *bona fides* of the transaction by which the charge against Haines & Co. for $100,000 worth of merchandise was wiped off the books of Wood, Brown, & Co., without the payment of any consideration whatever," depend on the real relation of the two firms to each other. As we now hold that the relation was that of separate debtor and creditor firms, that makes an end of this contention. The use of the firm's money by Wood and Brown for their contribution to the capital of Haines & Co., and the debiting of their firm $75,000 for that purpose on Haines & Co.'s-books, were without the consent or knowledge of the other partners, and therefore unauthorized, if not fraudulent. Calling it "capital" on the books of Haines & Co. did not change the character of the act. Haines & Co. got the credit in their accounts, without being entitled to it, and afterwards charged Wood, Brown, & Co. in the same way with $100,000 worth of merchandise which the latter never bought or received. No subsequent juggling with the accounts in the books could make these anything else than debts, or amount to payment.

Decree reversed, and the claim of appellant directed to be allowed.

PATTY-JOINER CO. ET AL. *v.* CITY BANK ET AL.

41 S. W. (Tex. Civ. App.) 173. 1897.

LIGHTFOOT, C. J. . . . Under the fifth, sixth, and ninth assignments by appellants they claim that the court erred in refusing to enter judgment on the verdict in favor of plaintiffs against the assignee and the sureties on his bond for the value of one-half of the cotton purchased by Simpson & Fuller, with interest, and judgment against the City Bank of Sherman for the value of one-half of the cotton transferred by Fuller to Simpson. The assignee, by cross assignment, also complains at the refusal of the court to render judgment against the bank for the value of one-half of the cotton of Simpson & Fuller. In this connection, appellee J. W. Simpson complains by cross assignments of error at the judgment of the court in holding that the partnership between Simpson & Fuller for the purchase of cotton was against public policy, and void, and for rendering judgment against J. W. Simpson for the value of one-half of the cotton. At the time J. F. Fuller made the assignment for the benefit of his individual creditors, he was in partnership with J. W. Simpson in the purchase of cotton. At the time of the assignment of his individual assets, he transferred to his partner, J. W. Simpson, all of his interest in 150 bales of cotton owned by the firm, in order that the latter might pay the firm debts. The partnership was indebted to the City Bank of Sherman for money advanced to buy cotton. Simpson assumed this indebtedness, sold the cotton, and paid the debt, and still lacked a small amount of liquidating it, which he supplied from his own means. It was claimed by the creditors of Fuller that his half of the cotton passed by the assignment. The principle is well settled that one partner of a firm has no power to assign or mortgage the partnership assets to pay or secure his individual debts without the consent of his partner. Johnston *v.* Shoe Co., 5 Tex. Civ. App. 398; Wiggins *v.* Blackshear, 86 Tex. 665. He could assign his interest in the firm assets without the consent of his partner, but such assignment would work a dissolution of the partnership, and the assignee would take such interest subject to the settlement of the partnership debts. There being a partnership between Simpson & Fuller in the purchase of cotton when the latter made the deed of assignment for the benefit of his individual creditors, even if he had included in such assignment, without Simpson's consent, all of his interest in the partnership cotton, it could not have carried anything except his interest in such surplus, if any, as might have remained after winding up the partnership business of the firm of Simpson & Fuller. There were not enough assets to pay the firm debts, so that, outside of the question of the transfer from Fuller to Simpson of his interest in the firm cotton, there was nothing for the assignee in the cotton or its proceeds. But it appears that Fuller made no attempt to include

in his assignment any of the cotton owned by Simpson & Fuller. On the contrary, he transferred to his partner, with notice to the assignee, all of his interest in the cotton for the purpose of being used to liquidate the firm debts, and Simpson promptly used it in payment of the firm debts. In the absence of fraud, this transfer evidences the willingness of Fuller that the firm assets should be applied by his partner just as the law would have applied them; and the individual creditors of Fuller, even if he had desired them to do so, could not have appropriated such firm assets to the payment of their claims without Simpson's consent.

But appellants claim that the above rules do not apply in this case, because the contract of partnership, as well as the contract by Simpson & Fuller with the bank, whereby the latter loaned the former money with which to buy cotton, were void as against public policy. This position is not taken by the parties in the pleadings, and there is no allegation upon which it is based; but upon the trial of the case, after the court had heard the testimony, it submitted to the jury a special issue upon the subject, and under their verdict found that the contract of partnership between Simpson & Fuller was void as against public policy; that the cotton purchased by each was his individual property; and, although it could not be shown how much was purchased by each, yet it was held that one-half the cotton was the individual property of Fuller, and passed under the assignment; and judgment was rendered against Simpson for the value of one-half the cotton. The facts on which this finding was based were, in substance, as follows: That about October 24, 1893, the partnership was formed by which they were to deal in cotton at Howe. Each partner was to furnish an equal amount of capital, and they were to share equally the profits and losses. Each partner was to buy cotton, giving his individual check for the amount of the purchase, the check to be marked "Cotton," and such checks were to be cashed by the bank, and charged to the partnership account of Simpson & Fuller. The cotton was weighed and tagged separately. This was all done for the purpose of inducing farmers who might have cotton to sell to believe that the two partners were competing against each other in the purchase of cotton. Their arrangements were made at the bank whereby they provided a partnership fund which they exhausted in the purchase of cotton under the above agreement, and then they incurred an additional indebtedness to the bank for cotton bought in the same way. At the time of Fuller's individual assignment, the firm of Simpson & Fuller owned 150 bales of cotton thus purchased, and owed about $300 more than their assets would pay when fairly applied to such debts. A partnership had been formed for the purpose of dealing in cotton at Howe. It cannot be doubted that the purpose was a lawful one.

But if, in the agreement for conducting their business, the partners concealed from the public the fact that they were buying as such, and

thereby induced people to believe that they were competing against each other for the purpose of preventing competition, a serious question might arise as to the validity of such dealing under our statutes and public policy if this was a contest between the firm and some party with whom they had such dealings, or from whom they bought such cotton. But such is not the case. The transactions had been fully completed. The firm owned certain property and owed certain debts; and one of the partners, desiring to make an assignment of his individual assets to pay his individual debts, transferred to his partner all of his interest in the firm assets for the purpose of allowing such partner to pay the firm debts, which appears to have been fairly done. Have such individual creditors a right to complain? They contend, in effect, that, the partnership having been formed to buy cotton by suppressing competition, it was void; that the assets acquired in the venture were owned by the partners individually, without reference to any debts which had accrued in the venture, and without reference to any settlement between the parties themselves; and that the interest of the failing partner in such assets passed to his creditors under his assignment, stripped of any debts of the concern, or any claimed rights of such partners. This position cannot be maintained.

In the leading case of Brooks *v.* Martin, 2 Wall. 70, a partnership had been formed for the purpose of buying up soldiers' claims before any scrip or land warrant was issued, which was directly contrary to the statutes, and hence illegal. After the results of the contemplated operation had been completed, the partner in whose hands the profits were, refused to account to his partner, and a bill was filed in equity for an account and division of such profits. Justice Miller, in delivering the opinion of the court, reviewed the authorities, and held that, though the contract was illegal, and either party might have refused to carry it out, or any soldier or party dealing with them in the purchase of such claims might have taken advantage of its illegality, yet, after the completion of their operations, the assets acquired were the property of the firm, and an account should be taken accordingly. The distinction between enforcing illegal contracts, or contracts void as against public policy, and asserting title to property or money which has arisen from them, is clearly and distinctly drawn. The above case is referred to with approval in recent decisions. Armstrong *v.* Bank, 133 U. S. 469; Farley *v.* Hill, 150 U. S. 576; Planters' Bank *v.* Union Bank, 16 Wall. 500. See also Armstrong *v.* Toler, 11 Wheat. 258; McBlair *v.* Gibbes, 17 How. 232; Sharp *v.* Taylor, 2 Phil. Ch. 801; Bly *v.* Bank, 79 Pa. St. 453; Harvey *v.* Varney, 98 Mass. 123; Greenh. Pub. Pol. 107, 108; Anson, Cont. 186.

In the case of Planters' Bank *v.* Union Bank, above, the court said: "The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in

hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin." 16 Wall. 500. The doctrine above announced has been fully adopted by our own Supreme Court, and the leading case of Brooks *v.* Martin, 2 Wall. 70, cited and quoted with approval. See Pfeuffer *v.* Maltby, 54 Tex. 461; Wegner *v.* Biering, 65 Tex. 511; Labbe *v.* Corbett, 69 Tex. 503; Lewis *v.* Alexander, 51 Tex. 579; De Leon *v.* Trevino, 49 Tex. 92. In the last-named case Judge Moore said: "But, if a contract is illegal, certainly it does not follow that it is illegal or immoral for the parties, after its completion, to fairly settle and adjust the profits and losses which have resulted from it." In the case of Lewis *v.* Alexander, above, which was a suit to settle a partnership business growing out of an illegal traffic, the court held that the knowledge on the part of a lender of money that the money loaned might be used in an illegal enterprise would not of itself, without other act in aid or in furtherance thereof, defeat the right of such lender to recover. It was also held that a partner who obtained more of the proceeds of the illegal venture than his share, must account to his co-partner. 51 Tex. 579. In this case, if the original purpose of the partnership between Simpson & Fuller was contrary to public policy, still the assets acquired by them were the property of the concern; and when Fuller transferred to Simpson all of his interest in the assets, so that the latter might use them in the payment of the firm debts, such transfer was based upon a legal consideration, which was not tainted by any vice in the original purchase of the property, and the transaction should be upheld. If the cotton on hand and owned by the partnership was the proceeds of an illegal venture, it is difficult for us to see by what process of reasoning it can be maintained that the individual creditors of one of the partners would have a prior right to satisfaction out of such assets over the creditors of the partnership, especially when the failing partner had, with the knowledge of the assignee, transferred his interest therein to his co-partner in order that it might be applied to the firm debts. If the partners had the right to dispose of the firm assets to pay the firm debts, and this was done in good faith, it follows that the court did not err in refusing to give judgment against the assignee and his sureties, or against the City Bank of Sherman. But the court erred in rendering judgment against appellee J. W. Simpson for the value of one-half the cotton, and his cross assignment to that effect is sustained. . . .

§ 5. Death of a Partner.

LANE *v.* WILLIAMS.

2 Vernon, 292. 1693.

One Newberry and Williams, the defendant's late husband, being woollen-drapers and partners, Newberry survived; and some years after Newberry also died, and the plaintiff sought to recover the debt against the executors of Newberry, who signed the note; but there being a deficiency of assets, he now brought this bill to have satisfaction out of the estate of Williams.

For the defendant it was insisted that it does not appear that Williams was privy or consenting to the borrowing of this money, or that it was brought into stock, or used in the trade; and had the plaintiff demanded it in the lifetime of Newberry, or before his estate was wasted and assets exhausted, the defendant might have had recourse to the bond of co-partnership, to repair the loss sustained by Newberry's taking up this money, and giving such note, without the consent or privity of her husband; but she had now lost that remedy, by the plaintiff's laches in not demanding the debt sooner; and therefore the plaintiff ought not to have the assistance of a court of equity to charge her. The Master of the Rolls, before whom the cause was first heard, dismissed the bill.

Per Curiam. The money being paid at the shop, the note of one partner binds both; and though at law the note stands good only against the executor of the surviving partner, who was Newberry, who received the money, and signed the note, yet proper in equity to follow the estate of Williams for satisfaction; and decreed it accordingly.

LORD SELBORNE, in KENDALL et al. *v.* HAMILTON.

4 Appeal Cases, 504. 1879.

"My Lords, the argument of the appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets of a deceased person, who has been a partner in a trading firm, and upon the language held by several judges of high authority with respect to the equitable position of partnership creditors.

"If that language were found to be technically exact, when tested by the practice of courts of equity, upon all occasions when the rights of partnership creditors have come in question, it might, perhaps, be a sound conclusion that its principle ought to be extended to such a case as the present, though no precedent directly in point has been

produced. But the fact is otherwise. If every debt of a trading partnership were regarded in equity as, from its commencement, joint and several, in the proper sense of those words, there could be no reason why in bankruptcy, where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debt; nor why Lord Eldon should have made such a decree as he did in the case of Gray *v.* Chiswell, 9 Ves. 118. Nor do I think it possible that if in equity, a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition.

"If no rule had been established in equity, giving partnership creditors a remedy against the assets of a deceased partner, it would have seemed clear, on principle, that in all these cases, when there was no mistake to be rectified in any written instrument, the legal contract between the creditor and the debtors was the only contract, and that its construction must be the same in equity as at law.

"I conclude, therefore, that those expressions of eminent judges in which partnership debts have been spoken of as, in equity, joint and several, were not meant by them to be understood in the proper and technical sense of those words; and that they cannot safely be used to establish any rule or principle extending beyond those limits within which courts of equity have hitherto given, to creditors of a partnership, remedies which they could not have obtained at law.

"It is undoubtedly true that the remedy which a court of equity gives to a partnership creditor, in the administration of the assets of a deceased partner, has the effect of preserving to him the liability of an estate which, by the survivorship of the co-debtor or co-debtors, has at law become exonerated. Great judges, such as Lord Eldon and Lord Thurlow, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners *inter se;* but this explanation does not, to my mind, remedy the difficulty, because, upon that principle, it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, viz., upon the surviving partners. The actual course of administration (subject to the distinction between a personal action and proof against assets) has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner, as he would have had by action at law in his lifetime. There is, as it seems to me, only one really consistent explanation of this course of practice, when taken in connection with the rule in bankruptcy, and with the general principles of law and equity, viz., that derived from the doctrine '*jus*

accrescendi inter mercatores locum non habet.' As in several other well-known classes of cases (of which mortgages and security bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, *inter mercatores*, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved *inter vivos*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although, when this rule was first established, it might well have been doubted whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by co-partners. For this purpose (and, as it seems to me, for this purpose only, and only by the operation of death) all such contracts may be described, as in equity, joint and several."

VOORHIS ET AL. v. CHILDS' EXECUTOR.

17 N. Y. 354. 1858.

PLAINTIFFS brought their action against the surviving members of the firm of Baxter, Brady, Lent, & Co., and against the respondent as executor of Childs, a deceased member of the firm. The complaint alleged the making of a promissory note by the firm; its maturity and non-payment; the subsequent death of Childs; the granting of letters testamentary to respondent as executor, etc. It did not aver any previous suit against the surviving partners or their insolvency. The respondent demurred on the ground that the complaint did not state a cause of action against him. A judgment dismissing the complaint as against him was affirmed by the General Term, and plaintiffs appealed to this court.

Richard W. Harrington, for the appellants.

Charles F. Sandford, for the respondent.

SELDEN, J. "Prior to the enactment of the Code of Procedure there was a conflict of opinion between the courts of this State and those of England, as to the remedy allowed to the creditors of a partnership against the representatives of a deceased partner. It was conceded by both that only the surviving partners could be sued at law, but it was held by the English courts that the representatives of the deceased partner might be immediately proceeded against in

equity and compelled to pay the entire debts of the firm, without any previous resort to the surviving members, or any evidence that such debts could not be collected from them; while on the other hand our courts held, either that the remedy against the survivors must first be exhausted, or it must appear that they were insolvent and unable to pay.

"Prior to the case of Devaynes *v.* Noble, 1 Mer. 397, the decisions of the Court of Chancery in England appear to have been, for a considerable time at least, in accordance with those in this State. The precise ground of the change seems to have been this: In the earlier cases it had been assumed that the liability in equity of the estate of the deceased partner was produced by a sort of equitable transfer to the creditor of the right of the surviving partners to insist that the estate of their deceased associate should contribute to the payment of the debts of the firm; but upon its being afterwards held that the obligations of partners were to be regarded as joint and several, the English courts said that in all cases of that kind creditors had a right to pursue their remedies against all or either of their debtors. They therefore held that they might proceed immediately in equity against the representatives of a deceased partner, without resorting to their legal remedies against the survivors. The courts in this State, however, refused, for what appear to be substantial reasons, to adopt the change. Its effect was, to apply to a proceeding in equity the strict legal rules applicable to suits at law. It obviously overlooked many equitable considerations of great force. The surviving partners succeed primarily to all the rights and interests of the partnership. They have the entire control of the partnership property, and the sole right to collect the partnership dues. The assets of the firm are of course to be regarded as the primary fund for the payment of the partnership debts, and it would seem equitable at least that the parties having the exclusive possession of this fund should be first called upon. The answer given to this by the English courts, that the representatives of the deceased partner have their remedy over, seems hardly satisfactory. The presumption is, that the primary fund is sufficient to meet the demands upon it. Why, then, permit in equity a resort to another fund, and thus give rise to a second action for its reimbursement. Besides, these English decisions permitting the creditor to proceed in the first instance in equity against the estate of the deceased partner are in conflict with the established doctrine that parties must first exhaust their legal remedies before resorting to courts of equity.

"But whether these considerations are sufficient to justify the positions assumed by our courts or not, it may be regarded as having been settled in this State, prior to the Code, that the creditor in such a case could not come into a court of equity without showing, either that the surviving partners had been proceeded against to execution at law, or that they were insolvent. Grant *v.* Shurter, 1 Wend. 148;

Hamersly *v.* Lambert, 2 Johns. Ch. 608; Leake & Watts Orphan House *v.* Lawrence, 11 Paige, 80; 2 Denio, 577, s. c. In the last of these cases, the English cases referred to were cited and distinctly overruled. There are many American cases, both in the State and United States courts supporting and confirming the doctrine of the courts of this State upon this subject. Pendleton *v.* Phelps, 4 Day, 481; Reimsdyk *v.* Kane, 1 Gall. 385; Sturges *v.* Beach, 1 Conn. 509; Alsop *v.* Mather, 8 Conn. 584; Caldwell *v.* Stileman, 1 Rawle, 212; Hubbell *v.* Perrin, 3 Ham. (Ohio) 287.

"The complaint in this case is in the form of an ordinary action at law upon a promissory note against all the surviving partners, together with the executors of the deceased partner; and contains no averment that any proceedings have ever been had against any or either of the surviving partners, or that they are without the means of payment. From what has been already said, it is plain that formerly no such action could have been maintained. The question presented is, how far the Code has changed the law in this respect. It cannot be claimed that it has altered the principles which govern the responsibility of the representatives of a deceased partner for the partnership debts, or the order of liability as between them and the surviving partners. It contains not a word indicative of such an intent. The latter, therefore, are still primarily liable for the debts; and the estate of the deceased partner can only be resorted to in case of the inability of the survivors to meet them. Hence it is plain that this action cannot be sustained as a suit in equity, founded upon the ultimate liability of the representatives of Childs; because it has been shown that in such an action it is indispensable to aver, either that the survivors have been prosecuted to execution at law, or that they are without the means of payment. What I understand the plaintiffs' counsel to claim is, that considering the suit as founded upon the legal liability of the surviving partners, the plaintiffs were warranted in making the executors parties by § 118 of the Code. [After considering this argument, and concluding that the Code did not "authorize a suit like the present," the learned judge concluded:] As, therefore, the present action must be regarded as one of a purely legal nature brought against the surviving partners, upon their legal liability, it follows, that the executor of the deceased partner, who is liable only in equity, were improperly made parties. . . . The judgment of the Supreme Court should therefore be affirmed."

Pratt and Strong, JJ., concurred in this opinion, and Denio, J., in the construction of § 118. All the other judges concurred in the result, upon the ground that the complaint made no cause of action against the respondent, reserving the question whether the insolvency of the surviving partners, or of the partnership estate, would justify a joint action against the survivors and the representatives of the deceased partners. *Judgment affirmed.*

STEWART'S CASE.

4 Abb. Pr. (N. Y.) 408. 1857.

THE SURROGATE. The testator was a member of the firm of J. J. Stewart & Co., and on the distribution of the sale of his real estate a question arises as to the proper mode of marshalling the assets between the individual and the partnership creditors. On the decease of Stewart, his surviving partners settled the affairs of the firm, and distributed the assets among the partnership creditors; but, the firm being insolvent, a large portion of the joint debts remained unpaid. The surviving partner also being insolvent, the only remedy remaining to the partnership creditors, for the unpaid balances of their claims, is against the estate of the testator, Stewart. The question is, whether the partnership creditors can come in and share ratably with the separate creditors of Stewart, or must be postponed until the separate creditors are paid. It is well settled, both at law and in equity, that the separate creditors of a partner of a firm can reach only the interest of their debtor, or his proportion of the surplus of the joint property remaining after payment of all the partnership debts. In the matter of Smith, 16 Johns. 102; Moody *v.* Payne, 2 Johns. Ch. 548. But in regard to the claims of the partnership creditors, there is a distinction between the legal and the equitable rule. At law, the partnership creditors may pursue both the joint and the separate estate for the satisfaction of their debts, which at law are considered both joint and several. On the death of one of the parties the legal right ceases against the deceased partner, and survives only against the surviving partner. A court of equity, however, will decree to joint creditors satisfaction of their claims, as against the representatives of the deceased partner, when by reason of the insolvency of the firm and of the surviving partner, no other remedy exists. Thus far the rule seems plain. But what are the rights of the joint creditors as against the separate creditors of the deceased partner, when the estate of the latter is insufficient to pay both classes of claims? Have the individual creditors a prior right to the individual estate, and are they entitled to be paid first, in preference to the joint creditors? The legal claim of the joint creditors against the separate property of the deceased partner is terminable by his death, but a remedy will be afforded in equity, according to equitable principles. The general doctrine is very clearly established in this State, that joint creditors shall not be permitted to reach the individual estate of the deceased partner until all the separate creditors are satisfied. Murray *v.* Murray, 5 Johns. Ch. 60; Robbins *v.* Cooper, 6 Id. 186; Wilder *v.* Keeler, 3 Paige, 167; Egberts *v.* Wood, Id. 517, 527; Payne *v.* Matthews, 6 Id. 20; Jackson *v.* Cornell, 1 Sandf. Ch. 348; Burtus *v.* Tisdall, 4 Barb. 571. The only exception to this rule, according to the English decisions, is where

there is no joint estate and no solvent surviving partner, in which case the joint creditors shall not be postponed, but will be allowed to come in ratably with the individual creditors. *Ex parte* Hayden, 1 Bro. C. C. 454; *Ex parte* Abell, 4 Ves. 838; *Ex parte* Pinkerton, 6 Ves. 814, note; *Ex parte* Kensington, 14 Ves. 447; *Ex parte* Kendall, 17 Ves. 521. But this exception does not prevail if the joint estate, though insolvent, be able to pay a dividend, however inconsiderable. Gray *v.* Chiswell, 9 Ves. 124; M'Culloh *v.* Dashiell, 1 Harr. & G. 96; Gow on Partn. 408. If there be any joint estate or fund, though of trifling amount, the joint debts are attached to that, and cannot receive dividends out of the separate estate *pari passu* with the separate creditors. It is not easy to perceive the ground of distinction upon which this modification of the exception is based. The general principle is, that the joint creditors are attached to the joint fund, and the separate creditors to the separate fund; but where there is no joint fund and no solvent surviving partner, so that the joint creditor is without remedy, then he may come in against the separate estate. The English courts of equity thus recognized both against the representatives of the deceased partner and his individual creditors, the joint and several character of the partnership debts, when other remedies are exhausted, at the time of the death of the deceased partner. The fact that some dividend has been or may be received from the joint effects, does not change the joint and several character of the partnership debts, but only tends to effect the equitable marshalling of the separate assets. After the receipts of the dividend, there remains as to the balance due no remedy against the separate estate, which, if there were no individual creditors, would be applied to the discharge of the balance. The principle upon which this rule is based would seem to be satisfied if the joint creditors bring in the dividend received from the joint estate, place it in a common fund, out of which all are to share alike, and relinquish the advantage of having claims, joint as well as several in their nature. To say that the joint creditor may resort to the separate estate, when there is no joint fund and no solvent partner, but cannot resort to it if he has happened to realize one mill on the dollar, would appear to establish a distinction more technical than just. If the dividend is brought in, the ground of the distinction ceases, no priority or advantage is gained, and all the demands are placed upon the common ground of equality. In this State, however, the distinction of the English courts of equity on this subject has not prevailed in regard to the general rule. In Wilder *v.* Keeler, 3 Paige, 167, the chancellor held, that although the joint creditors upon an allegation of the insolvency of the surviving partners have an equitable right to compel a satisfaction of their debts out of the estate of the deceased partner, this equity exists only against the heirs and representatives of the deceased, but not against his separate creditors; that if the joint creditors have received nothing on account of their

debts since the death of the decedent, the equities between the joint and separate creditors may be equal; but even in such a case the court has no power to deprive the separate creditors of their former rights and legal assets. The same principle was again asserted in Egberts *v.* Wood, 3 Paige, 517; in Payne *v.* Matthews, 6 Id. 20; Kirby *v.* Schoonmaker, 3 Barb. Ch. 46. The principle that equity will not interfere to destroy or impair the legal preference in regard to legal assets, which appertains to the separate creditors at law, is sound, and it established such a basis of distinctions as admits of a clear and consistent course of reasoning, and prevents any confusion. See Trustees *v.* Lawrence, 11 Paige, 80; Jackson *v.* Cornell, 1 Sandf. Ch. 348. Whether, therefore, the assets in the present case are to be treated strictly as legal assets, or ought to be marshalled according to equitable principles, the joint creditors cannot be permitted to have their debts paid out of the separate estate of the deceased partner until all the separate debts are paid. If, after such payment be made, any surplus remains, then it may be applied to the payment of the partnership creditors; and in that case those who have received partial payment out of the partnership property must bring in their dividends, and share ratably with those who have not received dividends, or else be excluded until the latter class of partnership creditors have received a sufficient amount to place them on terms of equality with the former.

DOGGETT *v.* DILL.

108 Ill. 560. 1884.

Craig, J. W. E. Doggett died April 3, 1876, testate, and Kate E. Doggett, appellant, qualified as executrix. Doggett, at his death, was a member of the firm of Doggett, Barrett, & Hills.

In 1871, T. C. H. and Lucy W. Smith executed their two promissory notes for certain sums of money, payable to Charles H. Dill. The two notes, on the date of their execution, were guaranteed by Doggett, Barrett, & Hills, the firm name to the guarantee being signed by Doggett. No effort was made by Dill to collect the amount due on the notes from the firm assets, or from the surviving members of the firm of Doggett, Barrett, & Hills, but, after the death of Doggett, he presented the claim to the Probate Court, to be allowed against the estate of deceased. The Probate Court, upon the evidence introduced, allowed the claim, and the executrix appealed to the Circuit Court, where a second trial was had, resulting in a judgment against the estate. An appeal was then taken to the Appellate Court, where the judgment of the Circuit Court was affirmed, and this record is brought here by the executrix for the purpose of reversing the judgment of the Appellate Court.

It is insisted by appellant that a partnership demand cannot be al-

lowed against the individual estate of a deceased partner until the legal remedy against the partnership assets and surviving partners has been exhausted.

In Mason *v.* Tiffany, 45 Ill. 392, which was a proceeding in chancery, by a creditor of a firm, to enforce payment of a firm debt against the estate of Tiffany, a deceased member of the firm, it was held that every partnership debt being joint and several, it follows necessarily, that resort may be had, in the first instance, for the debt, to the surviving partners, or to the assets of the deceased partner. In the decision of the case it is said: "If it was a fact that the surviving partners remained solvent for a long time before the assignment, and the assigned assets were sufficient to pay this claim, still these did not require the complainant to press his claim against them, the estate of the deceased partner being equally a fund on which he had a right to rely." This case seems to establish the doctrine, in plain words, that a creditor, in equity, has the right, where he holds a claim against a firm, one member of which has died, to proceed against the estate of the deceased member or the surviving partners, as he may elect.

In Silverman *v.* Chase, 90 Ill. 37, the same question arose, and following the doctrine of the case last cited, it was said: "A partnership debt is joint and several, and the creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner or against the estate of the deceased partner, as held by this court in Mason *v.* Tiffany, 45 Ill. 392. Nor will the *laches* of the creditor in following the assets of the firm preclude a recovery. The creditor has the right to proceed against the estate at any time before the statute of limitations has run, and a failure to pursue the partnership assets cannot be relied upon as a defence when suit is brought against the estate."

These two cases would seem to be conclusive of the question presented, so far at least as this court is concerned, as they, in terms, decide the same question involved in the record before us, and it would not be deemed necessary to say anything more on the question were it not for the fact that it is claimed that these cases are in conflict with prior decisions of this court, and the doctrine therein announced is not sound and in harmony with the current of authority on the subject. We have therefore concluded to briefly refer to some of the authorities which have a bearing on the question, with the view of showing that the decisions of this court are fully sustained by the weight of authority.

Story on Partnership, § 362, says: "The doctrine formerly held upon this subject seems to have been, that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became insolvent or bankrupt. But that doctrine has been since overturned, and it is now held that in equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have, in

all cases, the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner, whether the survivors be insolvent or bankrupt or not." The same doctrine, but in different language, is declared by Story in his work on Equity Jur., § 676.

Collyer on Partnership, § 580, declares the law in the following language: "It is now established beyond controversy, that in the consideration of courts of equity, a partnership debt is several as well as joint, and that upon the death of a partner a joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question whether the joint estate be solvent or insolvent, or to the state of accounts amongst the partners."

Dixon on Partnership, 113, says: "When a liability exists the creditor may, at his option, either pursue his legal remedy against the survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivor to pay."

Lindley on Partnership, 1053, says: "Whatever doubt there may formerly have been upon the subject, it was clearly settled before the judicature acts, that a creditor of the firm could proceed against the estate of the deceased partner without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased." See also Parsons on Mercantile Law, 192; Adams Eq. 173; Smith on Mercan. Law, 48; 3 Kent, Com. 63, 64, and note.

From the citations made, it would seem that the law as declared in Mason *v.* Tiffany, and Silverman *v.* Chase, *supra,* is fully sustained, at least by text writers of high authority both in this country and in England. But it will not be necessary to rely alone on the text books for a solution of the question, as the decisions in England and many of the States are in harmony with the rule declared in the text books.

In England, as early as 1816, in Devaynes *v.* Noble, 1 Mer. 529, it was decided, that in equity partnership debts are joint and several, and a creditor holding a firm debt could resort to the estate of the deceased partner for payment, without showing the insolvency of the survivor. The rule adopted in the case cited was subsequently adhered to and followed in Wilkinson *v.* Henderson, 1 M. & K. 582, and since the decision of these cases the doctrine there announced has been regarded as the settled law of England.

In Nelson *v.* Hill, 5 How. 127, the Supreme Court of the United States held that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner; that it was not necessary to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate.

In support of the rule announced, Story on Partnership, § 362, note

3, is cited. In a later case (Lewis *v.* United States, 92 U. S. 622), Nelson *v.* Hill is cited with approval.

In Camp *v.* Grant, 21 Conn. 41, the Supreme Court of Connecticut, in an able opinion, adopt the rule of the courts of England.

In Weyer *v.* Thornburgh, 15 Ind. 124, the question arose, and the Supreme Court of that State adopted the rule in the language of Story on Partnership, cited *supra*, and this decision was followed in a number of subsequent cases. Dean *v.* Phillips, 17 Ind. 406; Hardy *v.* Overman, 36 Id. 549.

In Freeman *v.* Stewart, 41 Miss. 141, the question arose, and the Supreme Court of that State held in equity all partnership debts are joint and several, and a creditor has the right to proceed in law against the survivor, and an election also to proceed against the separate estate of the deceased partner, whether the survivor be solvent or not. See also Irby *v.* Graham, 46 Miss. 428, where the English rule is fully approved. The same doctrine has been adopted in Vermont, in Washburn *v.* Bank of Bellows Falls, 19 Vt. 278. In Tennessee, in Saunders *v.* Wilder, 2 Head, 579. In Arkansas, in McLain *v.* Carson, 4 Ark. 164. In New Jersey, in Wisham *v.* Lippincott, 1 Stockt. Eq. 353. In Alabama, in Travis *v.* Tartt, 8 Ala. 577. In Florida, in Fileyau *v.* Laverty, 3 Fla. 72. In Texas, in Gant *v.* Reed, 24 Texas, 46. In New Hampshire, in Bowker *v.* Smith, 48 N. H. 111. In New York and Georgia a contrary rule has been adopted, as will be found in the following cases: Trustees *v.* Lawrence, 11 Paige, 80; Voorhis *v.* Childs, 17 N. Y. 354; Bennett *v.* Woolford, 15 Ga. 213. Upon an examination of the New York cases, it appears that the rule there adopted was supposed to be predicated on the old English cases, and when the courts of England established the doctrine which is laid down as the law in Devaynes *v.* Noble, and Wilkinson *v.* Henderson, *supra*, the New York courts refused to follow the English rule, but adhered to what was supposed to be the law in England as declared in that court prior to that time. Georgia seems to follow the New York rule.

In a late case in Wisconsin (Sherman *v.* Kreul, 42 Wis. 33) the Supreme Court say: "We are disposed to adopt the New York rule, that in order to recover against the administrators the plaintiff should allege and show that the surviving partner is insolvent." It is also claimed by appellant that the New York rule has been adopted in North and South Carolina, Ohio and Pennsylvania; but without stopping to determine precisely what the rule of the courts of these States may be, we are satisfied that the decided weight of authority is in harmony with the rule adopted in this State, and we are not inclined to change the rule heretofore adopted in this State, and follow the doctrine established by the courts of New York and Georgia, although we fully recognize the great ability of those courts.

It is also claimed that Silverman *v.* Chase is in conflict with Moline Water Power and Manf. Co. *v.* Webster, 26 Ill. 233, and Pahlman *v.*

Graves, Id. 405. This position is, in our judgment, based upon a misapprehension of those cases. In those cases there was a controversy between partnership and individual creditors, and the principle of marshalling assets was applied, as it should have been. Where there are individual creditors and partnership creditors, there is no doubt in regard to the law that all individual creditors have a prior claim against the individual assets, and partnership creditors have a prior claim against firm assets, and an individual creditor would have the right to insist that no part of the separate assets should be taken and applied in payment of firm debts until all separate debts had been paid in full. This familiar rule was applied in the two cases referred to, and also in the case of Ladd *v.* Griswold, 4 Gilm. 25. But there is no contest between individual and partnership creditors here, and hence the doctrine of marshalling assets does not apply. In this case no claims had been presented or allowed against the estate of any character, except the one in controversy, and no individual creditor is resisting the allowance of the claim.

But independent of the authorities, we are satisfied that the rule holding the estate of a deceased partner primarily liable in equity, is sound in principle. Doggett, in his lifetime, was individually liable for his debt, and if he had been sued, and a judgment obtained against him, any of his individual property would have been liable to be taken and sold in satisfaction of the debt. It is true, if he had been sued at law in his lifetime, it would have been necessary to join his partners as defendants in the action; but after judgment, it was not necessary to exhaust the partnership assets before individual property could be taken, but the creditor could resort to such property in the first instance, if he saw proper. Did the death of Doggett in any manner change the liability which existed on this contract before his death? We think not. The liability continued as before, but the remedy to enforce that liability was changed from a court of law to a court exercising equitable powers. Before his death the liability could only be enforced by a joint action against Doggett and his partners; after his death the liability continued, but could only be enforced in the Probate Court, which in the allowance of claims exercises equitable powers. The death of a debtor may extinguish a legal remedy on a joint contract, but we are not aware that it has ever been held that the death of a debtor could extinguish the debt or discharge the estate of the deceased.

In conclusion, we are satisfied, under the facts as disclosed by this record, appellee's claim was a proper one to be allowed against the estate of the deceased, and that it was properly allowed by the Probate Court.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

ISLAND SAVING'S BANK *v.* GALVIN.

36 At. (R. I.) 1125. 1896.

Assumpsit against Catherine Galvin, as executrix of Daniel Galvin, on a promissory note for $10,000, to the order of plaintiff, and signed, "Charles C. Peirce, Daniel Galvin, Patrick K. Horgan." Plea, that the promises set forth in the declaration were made by the defendant's testator jointly with Horgan and Peirce, as co-partners, doing business under the firm name of the Newport Laundry Company, and were the promises of the co-partnership. To this plea the plaintiff demurred.

W. P. Sheffield, Jr., for plaintiff.

C. A. Ives, for defendant.

Matteson, C. J. The note sued on does not purport to be a note of the Newport Laundry Company, a partnership composed of the three persons who were the makers of the note. It is simply the joint note of those persons, of whom the defendant's testator was one. The Judiciary Act, ch. 13, § 17; G. L. R. I. ch. 233, provides that, "Unless otherwise provided in the contract, upon the death of any joint contractor, his representatives may be charged in the same manner as such representatives might have been charged if such contract had been several instead of joint: provided, that the plaintiff shall first exhaust the partnership estate if such contract is a partnership contract."

As the note does not purport to be a partnership contract, and does not provide in it that on the death of either of the makers his representatives shall not be charged as if the contract had been several instead of joint, we are of the opinion that the suit is in accordance with the statute quoted; and, therefore, that it is properly brought against the defendant as the representative of the deceased. The demurrer to the first plea in bar is sustained, and the plea is overruled.

CHAPTER VI.

DUTIES AND LIABILITIES OF PARTNERS INTER SE.

§ 1. The Utmost Good Faith.

BLOOM et al. v. LOFGREN et al.

64 Minn. 1: 65 N. W. 960. 1896.

Action for the dissolution of a partnership and an accounting. The trial court found that the parties formed a partnership for the purpose of buying and owning a certain stallion; that Lofgren was intrusted with the purchase of the horse; that he had previously bought the horse for $1,200, but the partners, with one exception, were ignorant of the fact; that the partnership paid him $1,800 with which to pay for the horse, and that he then reported that he had bought the horse for the partnership for that sum, and produced a receipt for $1,800, purporting to be from the pretended owner for the price; that Lofgren was indebted to the partnership in the sum of $600 and interest. From an order decreeing a motion for a new trial, Lofgren appealed.

O. J. Vaull & M. A. Brattland, for appellant.

Calkins & Sharpe, for respondents.

Collins, J. . . . On April 15, 1891, it was agreed that Lofgren should purchase the horse in question of the supposed owner, Walker, for cash, for the association; that he should buy for $1,800, if he could not buy for a less sum; that he should advance the necessary money; and that he should take the notes of such persons as could not make immediate payment, payable at a future time, bearing 10 per cent interest. This was the final contract, and, as before stated, modified or entirely superseded the writing. If Lofgren had previously purchased the horse at $1,200, — and it was admitted that he had, — he fraudulently imposed upon those with whom he was dealing, his actual or proposed co-partners in the transaction. The law will not permit him to retain and enjoy the fruits of his fraudulent representations that Walker was still the owner, that the lowest cash price was $1,800, and his later representations of the same nature, that he had bought the animal as authorized, and had paid $1,800 for him. In their dealings with each other, partners occupy positions of trust, and are required to exercise the most scrupulous good faith towards each other. Nor is this requirement confined to persons who are actually co-partners, but it extends to those negotiating for a partnership not yet formed. All of the findings of fact were supported by the evidence.

Order affirmed.

HARLOW *v.* LA BRUM.

151 N. Y. 278: 45 N. E. 859. 1897.

GRAY, J. The plaintiff brought this action for the dissolution of a co-partnership between the parties, and for an accounting. After the commencement of the action, the defendant discovered that a fraud had been practised upon him, through which he had been induced to enter into the co-partnership. It consisted in fraudulent representations made by the plaintiff as to the cost of a certain stock of merchandise, which he put into the co-partnership, and the half of which, as represented, the defendant had paid in compliance with his co-partnership agreement. He thereupon interposed an answer setting up the fraud of the plaintiff, and asking judgment to the effect that there had never existed any partnership between the parties; that the agreement of partnership be set aside; and that the plaintiff be decreed to restore to him the consideration which he had paid on entering into the co-partnership. Upon trial of the issues, the court found that the representations made by the plaintiff to the defendant as to the cost of the stock of merchandise in question were false, and were made to induce the defendant to enter into the co-partnership agreement; that they were known by the plaintiff to be false when he made them; and that the defendant relied upon and believed them, and, except for the same, would not have formed such partnership. These findings were amply supported by the evidence. Judgment was directed and entered declaring the co-partnership agreement void; directing the receiver in the action, after paying the outstanding debts of the co-partnership, to pay to the defendant the money he had paid to the plaintiff, with interest thereon; and directing the plaintiff to deliver to the defendant a due-bill which he held for the balance of the purchase price for a half interest in the stock of merchandise. The trial court also found that the defendant had drawn out of the firm $6 a week for his living expenses, as was permitted by the articles to each party, but that the services of the defendant were worth $12 per week. Upon appeal by the plaintiff from the judgment recovered by the defendant, the General Term affirmed the same, and I think nothing need be added to the very satisfactory opinion rendered at the General Term upon the affirmance. But, as the plaintiff, who now appeals to this court, contends that the General Term erred in reasoning, that the rule of law has no application to the case which requires a party, in order to successfully invoke the aid of the court, to show that he has been damaged in a financial sense, a brief expression of our views may not be inappropriate.

The question of whether a money damage has been sustained by the party who has been induced to enter into a partnership relation through fraudulent representations has nothing to do with the decision of the case presented for the avoidance of the partnership agreement. The true principle by which the court is to be guided in such a case is that

the party deceived has a right to have the agreement wholly set aside. If it has been obtained by fraud, he is entitled to say that the misrepresentations vitiate the contract. Rawlins *v.* Wickham, 3 De Gex & J. 304. As was said by Lord Justice Turner in that case: "We cannot assume from what was done in ignorance of the misrepresentation, what would have been done if the misrepresentation had been detected." The relation of partners is one implying the highest degree of mutual confidence, as it was well observed in the opinion below; and, if the contract of partnership was initiated by fraud, it is thereby avoided and annulled. The person fraudulently induced to enter into the partnership is entitled to a decree cancelling the partnership agreement *ab initio*, as he can also have an action for the deceit. 2 Bates, Partn. § 595; Pars. Partn. (2d ed.) p. *467.

The trial court having found the making of the false representations, with the fraudulent intention to induce the defendant to enter into the partnership, no rule of law and no principle of equity stood in the way of its decreeing the cancellation of the agreement, and in its directions as to the judgment to which the defendant was entitled it followed the requirement of the rule in such cases, as it may be found laid down in the books. See Bigelow, Fraud, 629, and cases cited there. The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

LATTA *v.* KILBOURN ET AL.

150 U. S. 524: 14 Sup. Ct. 201. 1893.

JACKSON, J. The appellees, as members of a dissolved co-partnership, brought this suit against the appellant, another member thereof, for an account of profits made by the latter in certain transactions alleged to have been within the scope of the partnership business, and which, as claimed, it was his duty to have conducted for the benefit of the firm instead of for his individual advantage.

The material facts of the case, as disclosed by the pleadings and proofs, are as follows: In 1865 there existed in the city of Washington a co-partnership composed of R. M. Hall, C. H. Kirkendall, and Hallet Kilbourn, under the name of Hall, Kilbourn, & Co., which was formed for the purpose of carrying on the business of "real-estate brokers and auctioneers." The scope of this partnership, as indicated by the nature of its business, was one of agency, and consisted in negotiating and making sales and purchases of real property for the account of others.

In the latter part of 1865, Kirkendall withdrew from the firm, and the appellant, Latta, acquired and succeeded to Hall's interest therein, and thereafter the business of the co-partnership was conducted under the name of Kilbourn & Latta. These changes in the membership of the firm were attended with no change in the nature and scope of

the partnership business, which continued the same after Latta came into the firm as before, except that the business of auctioneers was discontinued.

The partnership agreement of the former firm, as well as that of Kilbourn & Latta, was in parol, and the business of each, as proclaimed to the world by their advertising cards in the newspapers, by the sign at the firm's place of business, by letter heads, and as published in the city directory, was that of "real-estate and note brokers," and consisted in buying and selling real estate on commission, renting houses, and negotiating loans. Kilbourn & Latta, as a firm, had no capital, and owned no property except a few articles of office furniture of little value; nor was there any agreement, arrangement, or provision made by which capital was to be supplied for the use of the firm, if any should be needed or required in the conduct of its business. The personal services of the partners constituted the only means of carrying on the business of the firm, and each member was to share equally in the profits and losses of the business. Kilbourn was without means, while Latta was possessed of considerable property.

During the existence of this partnership, which continued from 1866 to January 1, 1871, each member of the firm, with the knowledge of his co-partner, purchased real estate and other property on his private or individual account, and no question was ever made by either partner of the right so to do, nor did either partner ever claim that the profits realized on such purchases should be treated as belonging to the firm, or were subject to division among its members. By special agreement, and as a special venture, the partners purchased on firm or joint account two parcels of land on speculation; the money to make the purchases being advanced by Latta, in whose name the title was taken. In the same way, by special agreement, they purchased bonds and other securities, and special accounts of such transactions were kept upon the firm's books. In several instances the partners by special and mutual agreement, in lieu of commissions, took a share of the profits in property purchased and sold for the account of others, without assuming or incurring any responsibility for losses.

The two purchases of real estate on joint account, as well as those in which the partners of the firm took a share of profits in lieu of commissions, were special ventures in each case, entered into after special agreement between the partners, and were in no sense within the terms or objects, expressed or implied, of their regular partnership business. The scope and character of the firm's business did not extend to the buying and selling of real estate on account of the firm. It had no capital for that purpose, and no arrangements were provided by which it was to be supplied. The profits of the business were drawn and distributed as fast as earned.

On January 1, 1871, John F. Olmstead, who had been for many years a clerk for Kilbourn & Latta at an annual salary of twelve or fifteen hundred dollars, was admitted as a partner into the firm. The

new parthership carried on its business under the same firm name of Kilbourn & Latta, the respective interests of the partners being three-eighths of the profits of the business each to Kilbourn and Latta and two-eighths to Olmstead. This new firm, like the former, had no written articles of co-partnership. The scope and character of its business, as well as the respective interests of the partners therein, rested in parol. Olmstead brought no means into the concern, and neither the firm nor any member thereof, except Latta, possessed any property or capital. There was not only no provision or agreement for the accumulation of firm capital, but the course of business was directly the reverse, the habit of the partners being to draw against their respective shares of the profits, and on December 31st of each year the accounts were adjusted, and whatever balance each member of the firm had to his credit was drawn out of the firm and placed to his individual credit. The profits of the business, in which alone the partners were to share, were thus annually divided and distributed according to their respective interests.

Under this new firm, as under the old, the scope and character of its business, as indicated and made known to the public through the sign over its place of business, in the cards which it advertised, in the city directory, and its letter heads and envelopes, was that of "real-estate and note brokers." Aside from the scope and character of the firm's business as thus described and brought to the notice of the public, each of the three partners testified that the new partnership was a continuation of the business of the former firm of Kilbourn & Latta. . . .

This firm continued in existence from January 1, 1871, to January 1, 1877, when it was dissolved. During this period one or more parcels of land were purchased as a speculation on joint account by the members of the firm, after special agreement so to do had been entered into between them. These transactions, like those of the former firm, were special ventures, entered into after a special agreement between the partners to make the particular purchases. Bonds and other securities were also purchased from time to time under and in pursuance of special agreement between the partners.

These bond transactions were entered upon the books of the firm under what is called the "Bond Account," while the joint real-estate transactions were kept under an account styled or headed "Kilbourn, Latta, & Olmstead." This new firm did not, however, in any case make any speculative purchases of real estate on joint account with others, or upon any agreement or arrangement to take a share of the profits in lieu of commissions. All the transactions on either firm or joint account, other than the brokerage business of the co-partnership, were discussed and specially agreed upon before they were entered into.

Purchases on his individual account were made by Latta, the appellant, during the existence of the firm, with the knowledge of one or both of the other partners, and without objection being made thereto. Among other purchases made by him in his individual name and for his

individual account, were lots 34, 35, and 36, in square No. 445, in the city of Washington, designated as the "Thyson Lots," on the sale of which profits were made by him. Olmstead knew of the purchase of these lots as early as 1873, and neither made objection thereto nor set up any claim on behalf of the firm or of the partners thereof to a share of the profits made by Latta from the sale of the same.

In December, 1871, Latta entered into an agreement with Dr. Stearns by which they undertook to engage in the buying and selling of real estate in the District of Columbia on joint speculation, upon the terms that the capital to be invested should be furnished by Stearns, which, with interest, was to be first paid out of the proceeds of the sales of the property to be bought, and after the payment of all expenses the net profits of the speculation should be equally divided between the parties. Each party was to be equally responsible for any losses that might be sustained. Under this arrangement between them a number of lots and parcels of land were purchased in 1872; the titles to which were taken generally in the name of Stearns, but in one or more instances the title to property purchased was taken in the name of Latta. The purchases and sales of the lots and parcels of ground made by Stearns and Latta on joint account were conducted through the firm of Kilbourn & Latta, and were entered upon their books, and the firm received the regular commissions thereon, which amounted to about $5,000.

Before these purchases on joint account were closed out and the profits thereon were realized and distributed, Stearns, under date of July 30, 1872, executed and delivered to Latta a certificate, which recited that the real estate purchased under their arrangement was held by him on joint account, and that the terms of the joint account were as follows:

"The cash payments have been made by me; the future or deferred payments, principal and interest and taxes, are to be paid by me. I am to determine when, at what price, and on what terms, any portion of it may be sold; and when any proportion of it is sold I am to be repaid all the money I have paid out on account of that portion, with six per centum interest on the amount. Then, after all costs and expenses of the sale shall have been paid, the net profits are to be divided equally between the said Latta and myself. John Stearns. Mr. Latta has a copy of this."

While this certificate of Stearns does not mention losses, it is satisfactorily shown that Latta was to divide the losses in the event the property, when sold, did not realize costs and expenses; and in one instance he did divide with Dr. Stearns the loss upon a parcel of ground purchased on joint account. For some of the purchases made on joint account with Stearns, Latta executed his individual notes, and in the course of the business drew from and deposited with the firm of Kilbourn & Latta funds for the account of Stearns growing out of their joint enterprises.

While Latta did not consult his co-partners, or obtain their assent

to his engaging with Stearns in the joint purchases of real estate, he took no means of concealing it, and we are satisfied from the testimony in the case that Olmstead knew of these transactions of Latta with Stearns as early as 1873. He admits that he had a suspicion of it in 1874. The bookkeeper of the concern states that he cannot understand how the other members could fail to know of it; and a disinterested witness, William H. Philip, testified that about May, 1873, when he inquired for Latta at the office of the firm, Mr. Olmstead stated that Mr. Latta had gone to Europe, and in reply to the question whether for business or pleasure further stated that "Mr. Latta had just closed out some real estate, or perhaps a large amount of real estate, that he and Dr. Stearns were interested in," and that a part of his business in going to Europe was to see Dr. Stearns, and settle up their matters.

This direct testimony, in connection with the facts and circumstances surrounding the transaction of the business, leaves little or no room to doubt that Olmstead knew of the joint enterprises of Stearns and Latta as early as 1873.

This second firm of Kilbourn & Latta was dissolved in January, 1877, and, thereafter, in November, 1877, the appellees filed their bill against the appellant, in which, after reciting many of the facts already stated, they claim that the purchases of the Thyson lots and the joint purchases made with Stearns were properly partnership transactions, and that he (Latta) was accountable to them for the profits realized out of the same. The bill alleged that the profits realized from the purchases made with Stearns amounted to about the sum of $45,000, which was equally divided between Stearns and Latta, and that no part thereof was turned over to the firm of Kilbourn & Latta, but that it was wrongfully appropriated by Latta to his own use. The complainants further averred that they had no knowledge of these transactions of Latta and Stearns until after the dissolution of the partnership, and that Latta had conducted the same secretly, and thereby had defrauded the complainants. . . .

After voluminous proofs had been taken, the cause came on to be heard in the Supreme Court of the District of Columbia, October 27, 1886, when the complainants abandoned all claims against the defendant on account of the matters relating to the Thyson purchases, and thereupon the following decretal order was entered: "That the complainants are entitled to recover from said defendant their full share, viz., five-eighths of all profits realized by said defendant from said sales of real estate referred to in the pleadings and proof in this cause, made by said John Stearns and said defendant, with interest thereon from the time when the same were so realized, and it is, this 27th day of October, A. D. 1886, ordered, adjudged, and decreed that said defendant do account to the complainants for their said share of the profits aforesaid; that this cause be, and the same hereby is, remanded to the court in special term, with instructions to refer the same to the auditor of the court to state said account upon the proofs in the cause, and such further proofs as the parties may offer, and for

such further proceedings as may be lawful and proper under this decree; and that said defendant pay all costs of the cause." 5 Mackey, 304.

In accordance with that decree the cause was referred to the auditor of the court, who, after taking further proof, made his report, showing that there was, on January 1, 1888, due the complainants from the defendant on account of the latter's real-estate transactions with Stearns the sum of $21,562.59, with interest on $12,030.50 thereof from that date until paid. This report was excepted to, but the exceptions were overruled, and the report was confirmed November 30, 1888, and a decree entered in favor of the complainants against the defendant for the amount reported and costs of the suit. From this decree the present appeal is prosecuted. . . .

The court below based its opinion upon two grounds: First, that the scope of the co-partnership business and agreement, as alleged in the third paragraph of the bill (quoted above), was established, and that the appellant could not engage in purchases of real estate on his own account or in connection with others, except by the consent of his co-partners, without violating the duty and obligation which he owed to his firm; and, secondly, that even if the co-partnership did not include the business of buying and selling real estate on partnership account, still the appellant could not employ the knowledge and information acquired in the course of the partnership business in respect to the real-estate market in making purchases or transactions for his own benefit.

The general principles on which the court proceeded admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his co-partners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the proper determination of the question whether the appellant, in engaging in the joint enterprises with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question

on this branch of the case depends entirely upon this: Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm?

In his answer, which was called for under oath, Latta positively and in direct terms denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate, and that at no time was such transaction within the scope of the partnership business.

Under the well-settled rules of equity pleading and practice his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. The proofs in the present case not only fail to break down his denial on this point, but, on the contrary, affirmatively establish that neither under the first nor the second firm of Kilbourn & Latta did the partnership agreement extend to the business of buying and selling real estate either for investment or for speculation on firm account. Neither of the appellees testified to the contrary. The appellee Kilbourn, when pressed upon the question, evaded a reply thereto; and Olmstead, in his sworn testimony, failed to support the allegation of the bill as made on that particular subject. On the other hand the testimony of the appellant fully supported the denial of his answer, and he is corroborated by all the facts and circumstances in the case, such as the character of the business as advertised and as actually conducted. The well-known characteristics of "real-estate and note brokers," indicating, as the words imply, those engaged in negotiating the sale and purchase of real property for the account of others, afford a presumptive limitation upon the scope of the business, such as the appellant asserted and testified to in this case. His sworn answer and testimony on this point has not been overcome by the vague and equivocal testimony of the appellees. The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm. There is, therefore, no right on the part of the complainants to relief in this cause, based upon the consideration that the scope and character of the partnership business embraced the purchase and sale of real estate, either for the firm alone or jointly with others.

The further allegation of the bill "that all profits resulting from operations in real estate by any member of the firm of Kilbourn & Latta during the existence of said partnership should belong to said firm, and be entered upon the books of the firm, and be paid into the partnership account; and that no member of said firm should engage in the business of buying and selling real estate in the said District on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the said firm, and the firm had declined to take any part therein," — was also positively denied by the answer of the appellant under oath.

There is no testimony in the cause to overcome that denial. On the contrary, the evidence establishes that there was no such restriction or limitation imposed upon the individual members. So that the complainants were entitled to no relief on that ground.

But, aside from the foregoing questions of fact, how stands the case on the assumption that there was a new stipulation or agreement when Olmstead was taken into the firm (as claimed by Kilbourn and Olmstead, and as set out above) that knowledge and information obtained by any member of the firm as to bargains in real estate should be first communicated to the firm, with the view of giving the firm, or the members thereof, the first opportunity of purchasing, before any individual member thereof could act upon such knowledge or information for his own benefit? Can the agreement to furnish information as to bargains in real estate, and give co-partners the option of taking the benefit of such bargains be considered as so enlarging the scope of the partnership business as to include therein the purchase and sale of real estate on joint account? It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the co-partnership, come within the scope and character of the partnership business. That alleged stipulation, instead of enlarging the partnership business, was manifestly a restriction and limitation upon the power and authority of the co-partners to bind the firm, or the members thereof, in any real-estate transaction, until each member had expressly consented or agreed to join in the particular purchase, specially submitted for consideration.

By the well-settled law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions within the scope of the co-partnership. No express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm. If the buying and selling of real estate was a part of the business of Kilbourn & Latta, the alleged stipulation about giving an option to the firm and the members thereof to accept special bargains would have been an idle arrangement. But under the alleged stipulation each and every purchase of real estate was a special and individual transaction or enterprise, requiring the special assent and agreement of each partner thereto, before it became a subject of partnership, or was brought within the scope of the partnership business. Under the operation of the agreement, a partner who purchased real estate, either on joint or partnership account, did so not under or by virtue of the partnership articles, or under authority derived from the partnership business and his implied agency to represent the firm therein, but solely and exclusively from the special assent or agreement of his associates to engage in that particular purchase. So that each parcel of real estate to be acquired, as well as the agreement to purchase the same, was first made the subject of a special arrangement. It is diffi-

cult to understand how, under such circumstances and conditions, a co-partnership could properly be said to include or extend to the business of purchasing and selling real estate.

The special subject of each purchase, as admitted by Kilbourn, — like the purchase of bonds and other securities, — did not and could not come within the operation of the co-partnership, or become a part of the partnership agreement until each particular piece of property had been selected and agreed upon. It is undoubtedly true that, under this alleged agreement, if a partner had submitted to the firm or his associates the question of buying a particular parcel of land, and they had agreed to make that purchase, he would thereafter have occupied an agency or fiduciary relation in respect to that particular piece of property. But the question here is whether his failure to give the firm, or his co-partners, the opportunity of making an election to buy certain real estate, and his making the purchase thereof for his own account, or jointly with another, is such a violation of his fiduciary relations to the firm and his associates in respect to co-partnership business as to entitle the latter to call him to account for profits realized in such transactions. In other words, will the violation of his undertaking to give to the firm, or his associates, the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, entitle the co-partners to convert him into a constructive trustee in respect to the profits realized therefrom?

That the members of the firm, prior to 1871, or after that date, by special agreement, made purchases of particular parcels of real estate on speculation or for investment, did not make such speculative transactions a part of the partnership business so as to invest either partner with the implied authority to engage therein on account of the firm. The name of the firm was never, in fact, used in such special ventures, which no partner had authority to enter into except and until the consent of the others had been specifically obtained so to do, each instance of buying on firm or joint account being the subject of a separate, special, and distinct agreement.

It may be said of any and every partnership, irrespective of its regular business, that by consent of all the members other matters beyond the scope of the partnership may become the subject of investment or speculation on joint account; but such special transactions cannot properly be said to come within the scope of the partnership. The very fact that the express consent of each partner was required in order to engage in such special ventures goes clearly to show that the transactions were not within the scope of the partnership, for, if they were, special consent could not be required as a condition precedent for engaging therein.

Matters within the scope of the partnership are regulated and controlled by a majority of the partners, but by the alleged stipulation under consideration a single member of the firm could control the firm's action in respect to purchases of real estate. This is incon-

sistent with the idea that the business of the firm extended to such purchases.

Again, the alleged agreement does not provide how such future acquisitions as might be specially selected or agreed upon for speculation or for investment were to be paid for, or in what proportion the several partners should be interested therein. Neither does it distinctly appear from the allegations of the bill, nor from the testimony of the appellees, whether, in acting upon information given, the special purchases were to be made for the account of the partnership or for the account of the several members of the firm. The methods of keeping the accounts of such transactions in the name of the individual members rather than in the name of the firm would indicate that such purchases were for the benefit of the separate partners rather than for the firm.

There is no allegation in the bill, nor any direct statement in the testimony of the appellees, that if the information had been given as to the Stearns transactions, either the firm or themselves would have exercised the option of engaging therein upon the conditions of allowing Stearns to determine "when, at what price, and on what terms any portion of the real estate might be sold." Neither is it alleged in the bill, nor shown by the proofs, that the appellant in any way neglected the partnership business, nor that the firm and his co-partners sustained any damage whatever from the transactions. On the contrary, it is shown that from the purchases and sales of the property bought on joint account with Stearns the firm derived its regular commissions.

This alleged new stipulation amounts, if it has any legal force and operation, simply to an agreement for a future partnership, or the joint acquisition of such special properties as might by mutual and unanimous consent be considered as holding out a prospect of profitable speculation; and at most could only be regarded as an agreement for a future partnership in respect to such properties as might be specially selected for speculation. It is well settled in such cases that no partnership takes places until the contemplated event actually occurs. It stands upon the same principle as an option to become a partner, which creates no partnership until the option is actually exercised.

If the stipulation in question could be construed into an agreement that no partner should engage in the buying and selling of real estate on his own account, would that entitle the other members of the firm to share in the profits that Latta made in real-estate speculations without having first secured the consent of his co-partners to his engaging therein? No such proposition can be sustained.

In Murrell *v.* Murrell, 33 La. Ann. 1233, it was held that a partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original co-partner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages, but, inasmuch as the original

co-partner could not be held, without his consent, for the debts of the new firm, he cannot claim to be made a partner therein.

In Dean *v.* Macdowell, 8 Ch. Div. 345, one of the stipulations in the articles of co-partnership was that "said C. A. Macdowell should diligently and faithfully employ himself in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership," and by another article it was stipulated that neither partner should "either alone or with another person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership." The business of the firm was to deal as merchants and brokers in selling the produce of salt works on commission, and during its existence Macdowell clandestinely purchased a share in a firm of salt manufacturers. A bill was filed by the other partner for an account of the profits realized in the new business, and it was held by the Master of the Rolls that the bill could not be sustained. On appeal this judgment was affirmed. Lord Justice James, after stating the general principles of partnership law, said: "The business which the defendant has entered into was the business of manufacturing salt, which was to be the subject matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made, if by his joining in the partnership for the manufacture he had diverted the trade from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty; but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a partner in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damages done to the original firm by reason of his having become a partner in the works which produced the articles in which the firm traded. Under these circumstances it seems to me that we cannot say it was a benefit arising out of his partnership. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. He was only in a fiduciary relation to the partnership in this respect, namely, the same as a covenantor is with regard to any other covenantee in respect of any other covenant which is broken. It was a partner entering into a covenant with a partner; still it was simply a covenant that he would not do something which would result in damage. But it was not a covenant in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the Master of the Rolls was right in saying that you cannot extend the cases with regard to sharing in the profits to a case in which, as between these parties, there was really nothing but a breach of covenant, which breach in truth did not result and could not have resulted in a farthing's worth of loss to the partnership, unless, indeed, it could

lead to this: that the man was neglecting his business, devoting himself to the other business, and employing his time and attention and mind in it, and diverting himself from the business in which he was engaged." These views, which were concurred in by the other members of the court, are directly in point in the present case, which, in principle, cannot be distinguished from the case then under consideration.

We are clearly of opinion that the alleged new stipulation that each co-partner should furnish to the firm, or to the members thereof, information as to bargains in real estate, and give it or them the option to engage in the acquisition thereof before acting upon such information for his own benefit, neither enlarged the scope of the partnership so as to make it include the purchases and sales of real estate, nor precluded any member of the firm from making purchases on his own account or jointly with others; and that the act of the appellant in purchasing property with Stearns was not such a violation of his duty and obligation to the firm of Kilbourn & Latta, or to the members thereof, as to entitle the appellees to share in the profits which he realized therefrom.

In respect to the second ground, on which the court below rested its judgment, that the appellant could not take advantage of the skill, knowledge, and information as to the real-estate market acquired in the course of his connection with the partnership of Kilbourn & Latta, so as to gain any profit individually therefrom, but was bound to share with his co-partners all the beneficial results which could be derived from his knowledge or information on that subject, we need not do more than to say that this proposition is wholly unsupported either by the authorities or by any legal principle applicable to partnership law.

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of Aas *v.* Benham, [1891] 2 Ch. 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits.

It was further laid down in that case, in explanation of what was

said by Lord Justice Cotton in Dean *v.* Macdowell, *ubi supra*, that "It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd." And it was said by Lord Justice Bowen that the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property, so as to render him chargeable with the profits made therefrom. His knowledge of the real-estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business.

The points already considered being sufficient to dispose of the case, we do not deem it necessary to go into the other question discussed as to whether a parol partnership in respect to purchasing and selling real estate, or an agreement between co-partners to give each other the option of engaging in such purchases, would come within the operation of the statute of frauds.

We are clearly of opinion, upon the whole case, that the decree should be reversed, and the cause remanded to the court below with directions to dismiss the bill at the costs of the appellees, and it is accordingly so ordered.

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§ 2. To Devote Themselves to the Business.

BELCHER et al. *v.* WHITTEMORE et al.

134 Mass. 330. 1883.

W. Allen, J. This is a bill in equity in which the plaintiffs claim an interest in letters patent issued to the defendant John R. Whittemore for inventions made by him. When the inventions were made and the letters patent issued, the parties were co-partners in the business of manufacturing and selling agricultural implements, and in the foundry business, and the patents were for improvements in agricultural implements. The inventing and patenting of new and improved machines was no part of the business of manufacturing and selling them, and did not come within the scope of the partnership business. The facts do not disclose any contribution of means by the co-partnership which would give it an interest in the result. The time, labor, and materials belonging to the co-partnership, which were used by Whittemore in perfecting his inventions, with the knowledge and

without the objection of the other partners, were clearly not regarded by any one as contributions to work by the firm which would give it a property in the inventions which might be made. It is true that by the articles of co-partnership each partner was to give his time to the business of the firm, and not to engage in any other speculation or business in his own name and on his own account to the detriment of the firm; that Whittemore used his time, and labor and materials belonging to the firm, in making improvements in machines manufactured and sold by it; and that for some of the improvements so made he procured at his own expense, and in his own name, and for his own benefit, letters patent. But this did not make such inventions the property of the co-partnership. If he violated his agreement, or used the property of the firm without the consent of his co-partners, he was liable therefor. But it does not appear that he did anything to the detriment of the firm, or without the consent of his co-partners. The improvements he devised, whether patented or not, were a benefit to the firm by increasing its business, and no objection was made by any member of it, either to the making use by Whittemore of the facilities furnished by the business for making experiments and improvements, or to the procuring of letters patent by him for inventions so made. We know of no principle or decision which, upon the facts in the case, could give to the co-partnership any right in the patents.

Bill dismissed.

C. L. Long, for the plaintiffs.
G. Wells, for the defendants.

MATTINGLY *v.* STONE'S ADM'R.

35 S. W. (Ky.) 921. 1896.

PRYOR, C. J. By the terms of a written contract between M. P. Mattingly and W. S. Stone, the latter became interested as a partner of the former in two distilleries, — one, the "Old W. S. Stone Distillery;" the other, the "Daviess County Club Distillery." The consideration for the interest was the transfer by Stone to Mattingly of the exclusive use of a valuable brand belonging to Stone, and which Mattingly desired to appropriate to his own use, or that of the two distilleries. The interest of Stone was the one-eighth part of the stock ($30,000) in the Daviess County Club Distillery, and an interest of one-eighth in the Old W. S. Stone Distillery, its property and appurtenances; the latter to share in the profits after a certain period, in proportion to his interests. Each party was to render services, Stone running the one distillery, and Mattingly the other. The general control of the business was given to Mattingly. The partners failed to prosecute their business amicably, and certain suits followed, in one of which Stone brought an action to recover for his services, and failed, and Mat-

tingly an action to rescind the contract, with like results, neither being entitled to relief. The present action was instituted by Stone for a settlement of the partnership to which various defences were made. The appellant insists that there was no partnership, but a mere sale, and that Stone was entitled to rents for his interest, and not profits. Counsel for the appellant in the cases heretofore decided construed the contract as constituting a partnership, but whether so or not, it is plain the parties were partners by its terms, and a settlement should be had.

The question of more difficulty than any other arises from the contention of the appellant that the partnership was dissolved in March, 1885, when the former suits were instituted, and the parties ceased to have any business intercourse; but assuming, as we shall do, that the partnership continued, and that Mattingly had no power to end the partnership at his will or pleasure, it then becomes proper to ascertain the balance due, if anything, by Mattingly to Stone. Mattingly claims that he has sustained damages by reason of Stone's permitting other parties to use this brand after September, 1883, when its exclusive use was with Mattingly. There is nothing in this defence, and the fact that the Owensboro Distilling Company was to use the brand until December, 1887, was known to Mattingly at the time of his contract, and the entire defence as to its use by others is an afterthought, with no merit in it.

The appellant claims compensation for the management and conduct of the business, which was disallowed by the chancellor, and this, we think, is an error. The parties, by the terms of the written contract, were each to perform services, and to render that assistance necessary to the proper conduct of the business; and when Stone stood by and saw the entire management of the distilleries conducted by Mattingly, with his (Mattingly's) own capital, his labor and skill, it is neither just nor equitable that he should be allowed nothing, and Stone awarded his share of the profits, as if he had been an active partner. The report of the commissioner to whom the case was referred is plain, concise, and brief, in which he states that "Mattingly furnished all the capital to carry on the business for repairs, paid taxes and insurance, and, in fact, all the capital used in carrying on the business at both houses, and the proof shows that to furnish the capital and manage the business was worth $5,000 per annum. There was paid to Stone by Mattingly $1,992, or he obtained that much from the business. Stone rendered no service in operating, taking care of, or managing the distilleries." With this report, the chancellor charged Stone with the $1,992 he had received, and credited him by his one-eighth of the profits, which was $5,482.84, leaving due Stone by Mattingly $3,490.57, for which judgment was rendered. While we think $5,000 per annum for the six years is too much to allow Mattingly for the management of the business, furnishing capital, etc., he ought to be allowed not less than $3,000 per annum, which for the six years would be $18,000, one-eighth of which should be charged to Stone. The one-eighth would

be $2,250, and add to this the $1,992 Stone had received, makes $4,242. This sum taken from Stone's part of the net profits as reported, $5,482.84, leaves Mattingly indebted to Stone in the sum of $1,240.84, for which judgment should be rendered after first charging the net profits with the court's cost of the litigation below.

Reversed and remanded, that this may be done.

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§ 3. To Contribution.

WARRING *v.* ARTHUR ET AL.

98 Ky. 34: 32 S. W. 221. 1896.

Eastin, J. This action was brought by appellant in the Bell Circuit Court, alleging the existence of a partnership between himself and appellees, and seeking to enforce an alleged right of contribution from appellees of certain sums which he claimed to have paid in excess of his proportion of the partnership indebtedness. It is charged in the petition that this partnership relation arose by operation of law out of the fact that appellant and some of the appellees had, in the year 1890, signed articles of incorporation, and undertaken to organize a corporation in the town of Middlesborough, under chapter 56 of the General Statutes of Kentucky, and that all of the appellees had subscribed for and become the owners of stock in this proposed corporation, which had never, in fact or in law, become a corporation, by reason of the failure of the projectors thereof to comply substantially with the requirements of the statute regulating the formation of corporations in Kentucky.

It is alleged, however, that this abortive corporation commenced business and incurred liabilities which it was unable to pay, and that, the defects in its organization being discovered, and the fact that it had no legal corporate existence becoming known to some of its creditors, suits were brought against appellant to charge him individually, as one of the incorporators and stockholders thereof, and that he had thus been compelled to pay on its account the sum of $1,327.68. It is further alleged that by reason of the failure to become legally incorporated the relation between appellant and his associates became that of partners, and that they all became equally liable to creditors for said indebtedness, and that he was entitled to contribution from the others for their respective proportions of the amount paid by him individually. It is stated, however, that of his several associates only two, to wit, the appellees John M. Brooks and R. H. Fox, were, at the time of the filing of the petition, either solvent, or within the jurisdiction of the court, and appellant therefore asked that they be required to contribute equally with him the

amount he had so paid out, and asked judgment against each of them for an amount equal to one-third thereof, or $442.56.

To this petition a general demurrer was sustained by the court, and, leave being given to amend, appellant, at a subsequent term of the court, filed an amended petition, in which he alleged for the first time that the company or partnership referred to in his original petition was insolvent at the time of the filing thereof; that it never had any invested capital; that its business had been done on credit; that it had long since ceased to do business; that all the property it ever had had been sold by order of court; that from the time of the attempted organization it had been insolvent, and had long since been dissolved. To the petition as thus amended, appellees Fox and Brooks again demurred, but, their demurrers being overruled, they excepted, and were given time to answer. Separate answers were afterwards filed by these appellees, to which appellant filed replies, and also general and special demurrers, which were not then passed upon by the court, and separate rejoinders were then filed by Fox and Brooks, thus making up the issues on the pleadings. Appellant testified in his own behalf. Brooks gave his deposition; and a written statement by Fox, which was agreed to be read as his deposition, was filed, and these, with the exhibits attached to them, constituted the evidence heard upon the trial. Upon the hearing the court below overruled the demurrers filed by appellant to the answers of Brooks and Fox, respectively, but on the merits adjudged that appellant take nothing by his petition, and dismissed the same with costs, to all of which appellant excepted, and prayed an appeal.

The record before us presents some questions of more than ordinary interest, especially that arising on the merits of the case as prepared, and pertaining to the mutual obligations to each other of parties standing in the relation of the parties to this action; but, interesting as a consideration of that question might be, it is unnecessary, in our view of the case, and the decision of the court will be based entirely upon the sufficiency of appellant's petition to sustain the action against appellees. It is to be observed that the liability sought to be fixed by appellant on appellees is that of partners. The very foundation of the cause of action rests upon the assumption that the failure of these parties to pursue substantially the course pointed out in and required by the statute for the organization of a corporation made them partners in this business, and, a partnership being thus established by operation of law, this action for contribution as between partners was brought to charge each with his proportion of what one member thereof had been compelled to pay on account of partnership liabilities. Yet it is nowhere alleged in the petition as amended, nor is it anywhere claimed in the case, that there had ever been any settlement of the partnership accounts, or any accounting between the parties, whereby a balance had been struck, or whereby

the appellees were found to be indebted to the firm in any sum on final settlement.

That this is, as a general rule, necessary in order to enable one partner to maintain an action of this kind against his co-partners, is too well settled to require discussion. Where the transaction out of which the liability arises is independent of or outside of the partnership business, or where the partnership covers a single venture, or but one transaction, so that no accounting is necessary, the rule is perhaps different; but in a business such as the one under consideration here, covering a variety of transactions, we know of no exception to the rule as above stated. This rule is recognized by this court in the cases of Lawrence *v.* Clark, 9 Dana, 259; Shearer *v.* Francis, 9 Ky. L. R. 556; and Stone *v.* Mattingly, 14 Ky. L. R. 114, — and may be said to be fundamental as to the right of one partner to sue his co-partner.

It is true that this action was brought in equity, and that the petition contains a prayer for all general relief; but it does not ask for a settlement of the partnership accounts, or for a winding up of its affairs. It does state that the partnership is insolvent, but it nowhere says anything as to the nature or amount of its indebtedness; and while it alleges that appellant has made these payments for it, it takes no account of the fact that other members of the firm may also have paid out money for it, as Brooks in his testimony swears that he has done. And this shows the importance of the rule referred to, for how could this one partner have known the state of the account between this firm and each of the other partners when there had been no settlement of the partnership accounts, and how unreasonable it would be to allow him to maintain an action against each of the others for their full proportion of what he might have paid without reference to the question as to what they may have paid? In other words, how can there be any fair or just contribution, or any claim to contribution, as between partners, until after a final settlement and ascertainment of the exact state of the account of each partner, and a full settlement of the partnership affairs? Admitting all that is alleged in this petition to be true, it might well be that appellant was entitled to recover nothing from his partners by way of contribution on account of what he had paid, for, as there is no pretence that the partnership accounts have ever been settled it might appear on such settlement that appellant was still indebted to the partnership in a large sum, and that his partners had actually paid for it much more than he had done. Indeed, this very claim is here made by his partners. It is charged by them that, though he subscribed for stock to the amount of $2,500, yet he has paid for no part of it; and while he claims that it was agreed that he should not pay for it, still Brooks and Fox deny that there was any such agreement. We only refer to this, however, as illustrating the imperative necessity for and the eminent propriety of the rule which forbids that

such an action be maintained in the absence of a full settlement of the partnership affairs which will show the exact state of the account between it and every other person, and especially the other members of the firm, so that the claims and demands of the partners, as between themselves, may be known.

Another point to which attention may be called is the fact that this petition fails to state that this alleged partnership was an equal partnership, or that the appellees, Fox and Brooks, who are each asked to contribute equally with appellant, are equally interested with him in the partnership. It appears from the record that appellant subscribed for $2,500 of the stock, while each of the appellees named subscribed for $1,000 of the same. The fact that they were stockholders is the fact relied on for holding them liable as partners. Mr. Lindley, in his work on Partnership, lays it down as a general rule "that partners must contribute ratably to their shares towards the losses and debts of their firm" (2 Partn. 386); and this, we think, is the accepted doctrine on the subject. Certainly any other rule would be very inequitable in this case, and while we do not care to decide that this must be the basis of recovery in every such case, yet we would call attention to the absence from the petition in this case of any allegation as to the respective interests of the partners among whom this loss is sought to be apportioned.

In conclusion, it is clear from the views above expressed that no error was committed by the court below to the prejudice of appellant, and the judgment dismissing his petition with costs is therefore affirmed.

CLAYTON *v.* DAVETT ET AL.

38 At. (N. J. Eq.) 308. 1897.

STEVENS, V. C. The complainant filed his bill against the defendants for an injunction and account. The evidence shows that on April 20, 1892, the defendants, Julius Davett and Alex. H. Ross, formed a co-partnership to carry on the business of brokers, which was to commence on the 1st day of May, 1892, and to continue for five years, unless sooner dissolved in the manner pointed out in the partnership articles. The partnership lasted for a year only. By the terms of the partnership articles, each of the partners was to contribute the sum of $10,000 in cash. Ross paid in his share of the capital at once. Davett, not having any money of his own to pay in, applied to the complainant to lend him $10,000, which he did. On December 22, 1892, Davett signed a written acknowledgment that he had received the money. In this paper he agreed to put it in the business, and not to draw it out except for the purpose of repaying it to complainant. A few days after, Davett executed to complainant

a deed of assignment of his undivided one-half interest in the assets of the firm. This assignment, in terms, purported to be an unconditional assignment. The consideration therefor was stated to be $10,000. But very shortly afterwards, if not contemporaneously, he and complainant executed another sealed instrument, in which, after reciting the assignment, it was agreed that, in consideration of one dollar, so long as complainant retained his interest or share in said business, Davett should collect and take all dividends, income, interest, and profits earned by said share formerly held by him (Davett), but now owned and held by Clayton, and should apply and appropriate the same to his own use, except sufficient to pay said Clayton interest on $10,000. Davett was also empowered to collect and take whatever accumulated income and profits might be coming to the share at that date. The three papers just referred to were nearly contemporaneous in date, and were evidently parts of one arrangement. Taken together, they show that the real transaction was a loan of money by Clayton to Davett, secured by an assignment of Davett's interest in the assets of the partnership. The arrangement was therefore in the nature of a mortgage security, and was so regarded, not only by complainant and Davett, but — and this is a matter of considerable importance — by Ross as well. He was asked on the witness stand: "Did you keep any account for [with?] Clayton at all?" And his answer was: "Only to put in the entries when money was paid on Davett's share of the assets, on which Mr. Clayton held a mortgage." At the time of the dissolution of the partnership, on May 1, 1893, Ross was authorized by Davett, who was then insolvent, to get in the assets and pay the debts. According to an account appended to Ross' answer, he realized $20,976. He paid out for debts $7,259.37. Of the balance, he paid to Davett $756.87; he paid to Clayton, on account of Davett's share, $7,553.81; and he retained the balance ($5,405.95) for himself. In addition to the sum which the complainant, Clayton, received from Ross, it appears that he also received $1,675 from Davett. He has thus been paid at least $9,228.81 out of a total of $10,000 owing to him.

The question to be decided arises out of a counterclaim made by Ross against Clayton under the following circumstances: Ross paid the above money to Clayton before one Ward had recovered a judgment of $3,850 against the firm of Davett & Ross, and before one Illingworth had recovered a judgment of $1,941.18 against Ross personally. Ross now claims that, the assets of the firm having been insufficient to satisfy these judgments and yield him an amount of money equal to that which he paid on Davett's account, Clayton is liable to repay to him such sum as would, added to the amount of assets remaining in his hands, make his share of the assets equal to Davett's. The first of the judgments was recovered against the two partners, Davett and Ross, in an action of tort for trover and conversion of certain shares of stock. The second was recovered against

Ross alone in an action of deceit grounded on certain false and fraudulent representations made with respect to the solvency of one Graham, whose notes the plaintiff, Illingworth, was thereby induced to take. His claim for contribution in respect of the Illingworth judgment is entirely untenable, whatever view may be taken of the relations between Clayton and Ross. The judgment being rendered in an action of deceit, it was thereby conclusively established that Ross had been guilty of moral fraud in making the misrepresentation which was the foundation of that action. In Cowley *v.* Smyth, 46 N. J. Law, 383, Mr. Justice Depue expressly says: "In such an action [deceit] a false representation without a fraudulent design is insufficient. There must be moral fraud in the misrepresentation, to support the action." Counsel for Ross cites many cases in equity (where the rule is different), and in other jurisdictions, to show that a judgment in an action of deceit does not necessarily establish moral guilt; but, in view of the decision just quoted, they are without weight here. It was admitted that the rule of law is that, where there is moral guilt, contribution is not enforced, as between wrongdoers. But this is a case in which the sole wrongdoer seeks to have contribution against a person perfectly innocent. The case is much stronger than that of Thomas *v.* Atherton, 10 Ch. Div. 185, cited on the argument, in which contribution was refused.

If the claim to contribution in respect of the Illingworth judgment be thrown out, there remains the Ward judgment, in respect of which, if his account be correct, Ross would be entitled to recover a part of the money paid, as against his co-partner, Davett. This he does not ask. He seeks to recover it against the creditor of that co-partner, on the ground that that creditor, by reason of the assignment which he took, stands in his debtor's shoes. In his answer in the nature of a cross bill he alleges an express agreement on Clayton's part to refund in case of deficiency, but this he fails to prove; and so he based his right of recovery upon Clayton's legal or equitable obligation to contribute by reason of the assignment. His position is that the assignment made Clayton his partner, or quasi partner, and that as such he became subject to a partner's liability. If the legal effect of the assignment were as contended for, this position would be sound. But I do not think that, either in fact or in law, Clayton ever became Ross' partner. Certainly he did not carry on the business as partner, and, as I have already said, the legal effect of the assignment, read in connection with the two other papers already referred to, was merely to put Clayton in the position of an equitable mortgagee. After their execution the firm of Davett & Ross was to continue in the business in that name, as before, and did so continue, and Davett was to take the profits and apply them to his own use. He was only to reserve thereout sufficient to pay Clayton interest on $10,000. But, if Clayton was to be paid interest, it could only be because the relationship of debtor and creditor still continued in respect to that

sum. An absolute, unconditional sale of the interest could not have been contemplated, and, as I have said before, Ross himself so construed the writings. He says he "only put in the entries in the account he kept when money was paid on Davett's share of the assets on which Mr. Clayton held a mortgage."

Now if Clayton was merely Davett's creditor, secured in the manner I have mentioned, on what principle can he be bound to make contribution to Ross? Davett, the partner, is bound to make such contribution, but why is Clayton? The situation is this: Clayton, to the knowledge of Ross, has a lien, not upon the assets of the partnership, but upon Davett's share of those assets after the partnership debts are paid. Ross is intrusted with the winding up of the partnership affairs. In the ultimate disposition of Davett's share, he acts as Davett's agent. He knows the facts concerning the partnership transactions. Among other things, he knows that Ward has a claim against the firm. He must be presumed to know the facts concerning that claim. If it is good, its payment will diminish the amount to be ultimately distributed among the partners. Now, with knowledge of the existence of this claim, Ross, assuming it to be bad, pays to Clayton a larger sum on Davett's account than he otherwise would have paid. He does not think it necessary to retain in his own hands money sufficient to satisfy it, if it shall be adjudged good. He voluntarily pays to Clayton more, as the result shows, than he was under any obligation to pay. It is a well-settled rule that money voluntarily paid under a mistake of law cannot be recovered back. This is so held in cases where the mistake has reference to the amount which the creditor may properly demand from the debtor. Skyring *v.* Greenwood, 4 Barn. & C. 282; Bramston *v.* Robins, 4 Bing. 11; Higgs *v.* Scott, 7 C. B. 63. It must be so held with still greater reason where the mistake of law has reference, not to the debt itself, or to the amount demandable thereon, but to a collateral question arising between the debtor, or the debtor's agent, and some third person, of which the creditor may know nothing. I think I am safe in asserting that no case has gone the length of deciding that if an agent, through a mistake of law, supposing that he has in his hands more money of his principal than he really has, pays his principal's debt, he can recover back from the creditor as much of the money paid as turns out ultimately to be his own. Indeed, I do not understand counsel to have seriously contended for such a proposition. He rather rested his claim for contribution on the ground that Clayton, by reason of the assignment made to him by Davett, stood in Davett's shoes, and was affected by Davett's liability to reimburse him for partnership debts paid after distribution of the partnership assets among the partners. But this contention fails, of course, as soon as it appears that the effect of the papers signed was merely to give to Clayton a lien upon Davett's share of the assets, and not to make him a partner with Ross.

I think Ross is not entitled to contribution from Clayton in respect of the money paid either on the Ward or on the Illingworth judgments.

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§ 4. Actions at Law between Partners.

RYDER *v.* WILCOX.

103 Mass. 24. 1869.

Contract. Writ dated July 26, 1867. The declaration was as follows: "And the plaintiff says the defendant made a contract in writing with him, a copy whereof is hereto appended and made part of this declaration, whereby the defendant agreed to enter into and carry on with the plaintiff the business of manufacturing and selling oil and candles in the manner and upon the terms set forth in said written contract; and the plaintiff avers that he has in all respects well and truly performed the promises and agreements on his part to be kept and performed under said contract; but that the defendant, without sufficient cause or justification, has failed and refused to perform his promises and agreements in said contract contained, and has violated said contract, in this: that he has arbitrarily, and against the will of the plaintiff, and without sufficient cause or justification, entirely and completely excluded the plaintiff from all participation in the conduct and management of said business and in the profits thereof, and has arbitrarily assumed the exclusive management, control, and profit thereof to himself, without regard to the rights of the plaintiff; and that the said defendant has failed and refused to make an annual settlement of account with the plaintiff, and annual payment, in accordance with the terms of said contract; and that though the defendant has continued said business to the present time upon the premises, and with the tools and appliances of the plaintiff, and has made large profits therefrom, yet he has refused to acknowledge and recognize that the plaintiff has any rights under the contract."

The contract declared on, which was signed by the parties and dated October 2, 1865, was as follows: "The said Wilcox does hereby agree to enter into, establish, and carry on the business of manufacturing lubricating and other oils and paraffine candles, under the name, style, and firm of 'The New Bedford and Ohio Oil and Candle Company,' and to furnish the capital necessary for carrying on said business to the amount of $50,000. The business is to be carried on at New Bedford, and also in the State of Ohio, and is to be continued for the term of three years from the seventeenth day of April last past; and the said Ryder is to be employed as the general agent, superintendent, and manager of said business. And the said Ryder does hereby agree to take charge of said business as the agent,

manager, and superintendent of the same, and to devote all his time, attention, skill, and knowledge to said business, and to exert his best endeavors to secure the success and prosperity of said business during the said term of three years from the seventeenth day of April last past.

"And it is further agreed by and between the said parties, that the said Ryder shall receive in payment for his said services the sum of $1,000 per year during the said term, and one-half of the net profits of the said business. Annual settlements are to be made, and all sums due to said Ryder on said settlements are to be paid; or, if not paid, the amount is to be credited to him, and interest is to be allowed him on the same. And the said Wilcox is not to reduce the capital of said company below the sum of $50,000 during the term of his contract.

"And the said Ryder does further agree to hire and let to said company his oil works, buildings, fixtures, tools, and apparatus for manufacturing oil and paraffine candles at New Bedford, at and for the rent of $1,600 per year during the term of this contract. The buildings are to be kept in repair by the said Ryder, but the tools, fixtures, machinery, and apparatus are to be kept in repair by the company, and are to be returned to said Ryder in equal value at the end of this contract. The said company are also to have the use and benefits of all trade marks, names, and patents now used by said Ryder, free of any charge, during the time of this contract, and the same are to be re-delivered to said Ryder at the expiration of this contract, free from any claim or charge.

"And the said Wilcox does further agree that the said company shall have the use of his coal lands, oil works, mining apparatus, etc., in the State of Ohio, and the right to receive coal as much as shall be desired for the use of the company; for which, and the use of his said works and apparatus, he is to be allowed and paid by said company the sum of fifteen cents per ton. All necessary repairs on said works and apparatus are to be made by the company.

"All the operations of the late limited partnership of 'Henry Ryder' since the seventeenth day of April last are to be considered as done and performed under this agreement so far as the business of the company is concerned, and this agreement relates back to the seventeenth day of April last past.

"The said Wilcox is to be allowed interest on the capital stock invested in said company, at the rate of bank interest in Massachusetts."

The defendant demurred because the declaration set forth no cause of action; and the case was thereupon reserved by FOSTER, J., for the determination of the full court.

T. D. Eliot and *T. M. Stetson*, for the defendant.

E. L. Barney, for the plaintiff.

COLT, J. . . . It remains to consider whether the plaintiff's case comes within any of those rules which permit one partner to maintain

an action at law against another, for a violation of the partnership agreement. It is alleged, in substance, that the defendant has excluded the plaintiff from the management and profits of the partnership business; has refused to make annual settlements, and payments thereon; and, although he has continued the business upon the premises and with the tools of the plaintiff, and made large profits, has refused to recognize the plaintiff's rights under the contract. The action is brought before the expiration of the time limited for the duration of the partnership, and without any formal dissolution of it. It is not for the recovery of an ascertained general or special balance belonging to the plaintiff. There can be no recovery at law of the profits of the business, so long as it is possible, upon a final settlement and account between the partners, that the plaintiff might be liable to refund. It is not sought to charge the defendant as upon an agreement preliminary to the commencement of business, made for the purpose of launching the partnership, like promises to furnish capital; or upon separate securities given by one partner to another on partnership account; or where there has been a voluntary separation of funds from the partnership stock, and one partner is alone interested in the contract relating to it.

It is said that an action at law for damages for the breach of an express agreement, entered into by one partner in favor of another, will only lie where the action can be properly tried without going into the partnership accounts, and the damages sought will belong exclusively to the plaintiff, and where the plaintiff will not be liable in any contingency, affecting the future joint business, to contribute to his own payment. Lindley Partn. 731, 740.

But, without stopping to inquire whether this action can be maintained without violating these rules, it is sufficient to say that, whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff. We cannot find, in the instrument declared on, that the defendant did bind himself personally to make good to the plaintiff any certain sum as his share, if the partnership assets should prove deficient. The stipulations in this regard are to be construed not as personal covenants between the parties as individuals, but rather as provisions defining and regulating the mode in which the business of the company should be conducted and the profits divided. The agreements, on the other hand, for contribution to the partnership funds and property which each is to make, are made binding by name on each, and would no doubt be classed with those express agreements which may be the foundation of an action. Venning *v.* Leckie, 13 East, 7; Brown *v.* Tapscott, 6 M. & W. 119.

The principles we are considering are illustrated in the case of Paine *v.* Thacher, 25 Wend. 450, where it was held that, if one partner promises another partner to pay him a compensation for personal attention to the business of the concern, this promise may be

enforced at law, notwithstanding the existence of the partnership and written articles providing for such payment. Nelson, C. J., says, in this case, that the item for services had been adjusted, and there was an express promise to pay it, and the compensation was to be contributed "as a part of the capital, to be furnished by the defendant in lieu of personal attention."

It is plain that there can be no recovery at law for work and labor for the firm or for contributions to its funds, in the absence of an express agreement of the defendant; and the plaintiff does not aid his case by alleging a willingness to perform, and a prevention by the defendant.

The rights of the parties are regulated by the general principles of the law of partnership, when not changed by special agreement. They are joint owners and possessors of the capital stock, funds, and effects of the company. Each has equal right to the possession, and equal right in the conduct and management of the joint business, and is clothed with like authority.

In the opinion of the court, upon the case stated in this declaration, no action at law can be maintained. If the declaration could be taken as alleging an entire repudiation by the defendant of the contract and of the relation of partnership, with a claim of damages for such a breach of the contract, instead of compensation for services in conducting the business, and for a share of its profits, such an action might be maintainable. We do not so understand its allegations. A failure and refusal by the defendant to perform his promise and agreement is indeed charged, together with an exclusion of the plaintiff, and a refusal to acknowledge that he has any rights under the contract. But it also alleges a refusal to make the annual settlement of accounts and annual payments, according to the contract, and sets forth a continuance of the business upon the premises and with the tools and appliances of the plaintiff, with large profits therefrom, from a participation in which he has been excluded. The remedy in such cases is in equity, where the power to investigate accounts, to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had.

In Capen *v.* Barrows, 1 Gray, 376, it was held that an action at law to recover damages, brought by one partner against his co-partner, for neglect of partnership business, could not be maintained while the affairs of the firm remain unsettled, although it was expressly agreed that each partner should devote his whole time to the partnership business. The principle of that case is applicable here. Fanning *v.* Chadwick, 3 Pick. 420; Williams *v.* Henshaw, 11 Pick. 79; Met. Con. 133; Holmes *v.* Higgins, 1 B. & C. 74.

Demurrer sustained.

PATRICK ET AL. v. WESTON.

22 Colo. 45: 43 Pac. 446. 1895.

ACTION by Weston against his co-partners for an accounting and for a recovery of his share of firm moneys, which had been applied by them to the debts of the preceding firm. A trial to the court resulted in findings and judgment as follows: "(1) That the plaintiff is not entitled to dividend No. 31. (2) That the plaintiff is liable for his proportionate share of the pay of the manager, W. F. Patrick, as manager of the mines. (3) That the plaintiff is not liable for any of the Minnie judgment, or any of the money paid thereon. (4) That the plaintiff is not liable for any portion of the judgment rendered in the suit of the Colorado Smelting Company against W. F. Patrick *et al.* (5) That the plaintiff is not liable for any portion of the expense paid in the McLean suit. (6) That the plaintiff is not liable for any portion of the amount paid as attorney fees by the management. (7) That the plaintiff is entitled to recover from the defendants $\frac{5}{84}$ of the amounts withheld and paid out for these several purposes, together with interest thereon, at the rate of 8 per cent per annum, from the date that dividends should have been declared therefor. (8) That the amount so withheld from the plaintiff by the defendants is $4,054.90, and that the interest thereon amounts to the further sum of $650.95. Therefore, it is ordered, adjudged, and decreed by the court that the plaintiff have and recover of and from the defendants the sum of $5,305.65, together with his costs in this behalf expended, to be taxed, and that he have execution therefor." To reverse this judgment, this writ of error is sued out.

C. C. Parsons and *F. L. Baldwin*, for plaintiffs in error.

A. S. Weston and *John A. Ewing*, for defendant in error.

HAYT, C. J. With a few well-understood exceptions, the law of mining partnerships is quite similar to the law governing ordinary trading partnerships. Among these exceptions is one which allows one member of a mining partnership to convey his interest in the mine and business to a stranger without dissolving the co-partnership. This exception has grown out of the necessities of the case, which require the continuous working of mines in order that the same may be made profitable. So, likewise, it has been held that neither assignment, nor death, nor bankruptcy of the owner of an interest in a mining concern should operate to dissolve a co-partnership existing for the purpose of working the mine. Another difference between a mining partnership and an ordinary trading partnership is that the former is not founded upon the *delectus personæ*, while the latter is. Hence, one mining partner has not the right to bind his associates to the same extent as a member of a trading partnership. Charles v.

Eshleman, 5 Colo. 114; Manville *v.* Parks, 7 Colo. 128; Higgins *v.* Armstrong, 9 Colo. 47; Meagher *v.* Reed, 14 Colo. 335.

The contention of plaintiffs in error is that, when defendant in error, Weston, became an owner of and interested in the real estate, and a member of the mining partnership, he became such owner *cum onere*, subject to the settlement of the partnership accounts, and subject to the payment of the partnership debts, of which the Minnie judgment, the expenses of the suit of the Colorado Smelting Company against Patrick *et al.*, and the costs of the McLean suit, with attorney's fees and expenses, were a part. This contention of counsel is not supported by any adjudicated case, and, upon principle, we think that an incoming partner ought not to be liable for debts contracted prior to his acquiring an interest in the property, and prior to his becoming a member of the mining partnership. Cases in which the incoming partner has been held liable may all be resolved into instances in which the real estate was either purchased by the partnership with partnership funds, or was brought into the firm as a part of the capital stock by the individual members of the co-partnership. In the case at bar, as we have seen, there is no evidence of a partnership in the ownership of the mines; the evidence being to the effect that an ordinary mining partnership was formed for the purpose of prospecting and working the properties. We are not concerned in this case, nor do we decide, as to what the rights of partnership creditors may be, in equity, to enforce their claims against the property of the firm or individual members thereof. We are only concerned with the law governing partners *inter sese;* and, certainly, in the absence of an agreement to the contrary, the general rule is that an incoming partner does not become liable for debts contracted prior to the time he became a member of the partnership. This principle is elementary, and there is nothing in this case to bring the plaintiff, Weston, within any exception to the rule; and we therefore hold that he was not liable for any part of the Minnie judgment, or any part of the claim of the Colorado Smelting Company, or of McLean, or of the expenses of any of these suits.

It is contended, however, that the court below erred in rendering a joint judgment against the defendants. It sufficiently appears, from the evidence in this case, that the defendants acted in concert in reference to these matters, and by their joint action caused the funds of the company to be used in the payment of obligations for which they were jointly and severally liable, and for which Weston was not liable. Under these circumstances, by a familiar principle, they became jointly and severally liable to him for the amounts thus diverted. . . . *Affirmed.*

NEIL, J., IN MORRIS *v.* WOOD ET AL.

35 S. W. (Tenn.) 1013. 1896.[1]

BUT is a partner responsible for a fraudulent conversion of stocks belonging to the firm within this rule?[2] We see no reason why he should not be. If his wrongful act amounts to a fraudulent conversion, within the technical meaning of that term, the effect upon those injured by his act is the same as if he were not a partner, and the legal quality of the act is the same, inasmuch as to hold the act complained of a fraudulent conversion necessarily is tantamount to saying that his relation of partner did not, under the circumstances, justify his act. But, under what circumstances is a partner liable for a conversion, — that is to say, a fraudulent conversion? "It is not, as I understand it," said the Master of the Rolls in *Ex parte* Harris, 2 Ves. & B. 210, "necessary for the joint estate to prove more than, in the words of Lord Eldon, that the overdrawing was made for private purposes, against the prohibition, either express or implied, in the partnership agreement, without the knowledge, consent, privity, or subsequent approbation of the other partners. That is all that is necessary to be proved; but, if that is shown, it is *prima facie* a fraudulent appropriation, within the rule." Pol. Dig. Partn. 145, 146. And, after quoting the above, the learned author proceeds: "It appears, therefore, that the term 'fraud' is used, for the purposes of this rule, in the wide sense formerly given to it by courts of equity. Lord Eldon expressly defines it to mean any taking of partnership funds which is not by contract, or loan, or with the express or implied authority of the other partners." Id. 146. The language of Lord Eldon upon the subject is: "I take it, now, to be necessary, attending to the result of Lord Thurlow's decisions in *Re* Lodge and the other cases, that, in order to establish a right of proof for the joint estate, it must be made out that the money was taken improperly and fraudulently, — in this sense improperly and fraudulently, that it was taken against the contract between the parties, express or implied, or, as against an individual partner, to increase his private estate. I have oftener than once expressed my confirmation of that opinion that those circumstances would, in a legal sense, constitute fraud. Cases of this kind, however, must be decided upon their particular circumstances; and the conclusion of law as to fraud must depend upon the nature of these circumstances."

In T. Parsons on Partnership, § 394, it is said: "The fraud may be constructive only, and any act would be so which violated the articles or agreement of the partners, or abstracted or appropriated property or funds by the act of one partner only, without the authority,

[1] Court of Chancery Appeals. Orally affirmed by the Supreme Court, March 9.

[2] The rule of Wright *v.* Bank, 110 N. Y. 237: s. c. Burdick's Cases on Torts, 2d ed. 433.

consent, or knowledge of the others." This is said in the chapter on "Bankruptcy and Insolvency," and in laying down the rules governing the question when the joint estate can call upon the estate of individual partners to restore property improperly withdrawn from such joint estate, and *vice versa;* but, as we have already intimated, the underlying principle must be the same upon settlements between the partners themselves, where one of the firm has fraudulently withdrawn firm assets.

With these principles in view, we shall now examine the facts appertaining to the particular controversy in hand. They are as follows: On the 8th of September, 1886, the complainant and the defendants W. J. Wood and W. B. Wood entered into a written contract, as follows: The contract first sets out that the complainant had sold to said W. J. and W. B. Wood a two-thirds undivided interest in the tract in the Twelfth Civil District of Wayne County, known as the "Bently Tract," and then proceeds: "And it is agreed that said Morris will buy other lands adjoining or in the neighborhood of this tract, at one dollar per acre or less, and the said W. B. and W. J. Wood are to be joint owners of two-thirds interest, and to pay two-thirds of the cost of said lands he may purchase, 100 acres of which he now puts in at one dollar per acre." A large number of tracts were purchased under this agreement, and the titles were sometimes taken to complainant and sometimes to W. B. and W. J. Wood, and on one or two occasions to one Sample, an agent of the parties. The dealings of the three parties concerned under this agreement showed that they construed the contract as constituting them partners in said land transactions, in which each was to contribute one-third of the purchase price of the lands, and each was to share equally in the profits. In confirmation of this, in addition to the language of the agreement as to "the costs of said lands," we refer to a settlement made between the parties February 9, 1887, which will be more particularly referred to hereafter in another connection. This settlement showed a sale of certain lands to the Florence Land, Mining, & Manufacturing Company, and an equal division of the proceeds. These tracts so sold, and proceeds divided, were 13 in number, and embraced nearly 10,000 acres. The said settlement contains, also, the following additional clause, with reference to unsold lands: "The following lands were bought and are still owned by us jointly, though the deeds are taken in our individual names, to the different tracts, namely." Then follows a list of tracts, and included in this list appears the following: "Thomas Newcomb, . . . 3,200 acres." This is the tract the proceeds of which are now in controversy.

At the time the settlement was made, all parties were under the impression that the title to the Newcomb tract was in W. B. and W. J. Wood, by deed from Newcomb; but it had been, in fact, placed in one H. W. Sample, agent of the parties, under the following circumstances: Complainant had negotiated a purchase of the land with

a son of Newcomb, the son living in Wayne County, and the father in Corinth, Miss. Complainant got crippled, and was unable to go to Corinth to close the trade, and Sample was sent for this purpose, and did so, but took the title in his own name. It does not appear, however, that Sample ever claimed the land, or did otherwise than recognize the rights of the true owners therein. And subsequently, as we have stated, the real owners, complainant and W. B. and W. J. Wood, recognized the land as belonging to the partnership. This was in February, 1887.

On June 27, 1887, W. B. and W. J. Wood, under the impression that Sample had taken the title in their name, made a deed of the land to the Florence Land, Mining, & Manufacturing Company, in consideration of 225 shares of stock of said company, which were then passed to their credit on the stock book of the company. On July 26, 1887, without informing complainant of the above-mentioned conveyance, W. J. Wood wrote to complainant as follows: "I am going to Florence the day after to-morrow, but will hardly have time to get notice to you so that you can meet me there. I cannot accept any of your propositions to swap my interest in the Parker lands for yours in the Newcomb lands, but I think I can sell both the Newcomb and Parker lands at prices that will pay you and I to let them go. Will you please send power of attorney to Judge W. B. Wood, Florence, Ala., authorizing him to sell and make a conveyance of your interest as well as his and mine? Of course, you will understand that whatever we get out of the Newcomb or the Parker lands is to be divided equally, share and share alike, between you, Judge Wood, and myself. Send power of attorney authorizing us to sell these two tracts of land at once, as I think it very probable that we will find a purchaser in a short time. I think I can get 75 cents or $1 an acre for the Newcomb land, and $1 or $1.25 for the Parker land." This was within a month after W. B. and W. J. Wood had, in fact, made a conveyance of the Newcomb land to the company.

Again, on August 6, 1887, W. J. Wood wrote the following letter to complainant: "If you have not done so, please send at once, to Judge W. B. Wood, at Florence, the power of attorney authorizing him to sell your interest in the Newcomb and Parker tracts of land. I think that we can make this sale at once, and I think, also, that it is important for us to do so while we can. You will, of course, share in the profits of the sale, which will be equally divided between you, Judge Wood, and myself. Don't fail to send this power of attorney to Judge Wood at once, so that the sale can be made, and do not delay as you sometimes do about things, so that we will lose an opportunity of selling the land. I expect to get more out of it for you than you offered to take recently for your interest in those tracts." Again, on August 18, 1887, W. J. Wood wrote the following letter to complainant: "Your postal was received. I met Judge Wood recently, and think he can sell the lands for us at a fair price.

If he cannot sell them, we will buy part of the Newcomb land, which we can use, at a slight advance to you on the original purchase. If he can sell them, however, and I hope he will do so, we will, of course, divide whatever the proceeds may be. Will you please, now, in order that Judge Wood may show the party with whom we have been negotiating that we can make this sale, sign inclosed power of attorney, acknowledge it before a notary public, in the same form that deeds require to be acknowledged, and forward at once to Judge Wood at Florence? Please attend to this promptly." On the 19th of September, 1887, having discovered that the title to the Newcomb land had been taken to H. W. Sample, as before stated, the said W. B. and W. J. Wood caused him to make a deed to the said Florence Land, Mining, & Manufacturing Company.

Meantime the stock, which had been received for said land on the 27th of June, 1887, when they themselves made the deed to the company, was standing in their names on the stock book of the company. They did not communicate to the complainant the fact that they had made the sale June 27th, nor the confirmatory deed of Sample, nor that the stock was in their name, but left him to find out these matters, from the secretary of the company, in March, 1890, and when the bill was filed denied in their answer that the complainant was entitled to any part of said stock received for the Newcomb land. The appropriation so made of the stock was not with the consent, approval, or subsequent ratification of the complainant. We think the above-recited facts make out a case of fraudulent conversion of the stock, within the sense and meaning of the authorities upon that subject above quoted. We therefore sustain complainant's exception upon this subject, above quoted, to the extent of holding that defendants should account for complainant's interest in the stock at 25¼ cents on the dollar. . . .

SULLIVAN, J., IN HASKINS *v.* CURRAN ET AL.

43 Pac. (Idaho) 559. 1895.

THE stipulation in the agreement sued on is as follows: "It is hereby agreed that the undersigned, W. S. Haskins, shall furnish such money as long as it may be mutually agreeable to him and the said Martin Curran and Susie Hussey to carry out the terms of said bond; and, in consideration of such advancements, said Martin Curran and Susie Hussey hereby admit him as an equal one-third partner in and under said bond, and in and to all property rights, titles, and interests therein and thereunder, and obligate themselves to repay him on or before June 3, 1892, two-thirds of all money so advanced by him, with interest at the rate of ten per cent thereon per annum from date of such advancements, with costs of collecting the same,

if any, including reasonable attorney's fees." This contract is one admitting Haskins to participate equally in a co-partnership theretofore existing between Martin Curran and Susie Hussey; and, in consideration of being admitted a one-third partner therein, he agrees to put up his one-third of the money required, and agrees to loan, or, if you please, advance, the two-thirds required to be advanced by his co-partners; and, in consideration thereof, his co-partners obligate themselves to repay their share so advanced on or before June 3, 1892, with interest thereon, and also to pay all costs of collecting the same, including a reasonable attorney's fee. Here is an express promise by Curran and Hussey to repay their share of advances made by Haskins on or before June 3, 1892, including interest and costs of collecting the same. Under those circumstances, the money so advanced becomes the debt of the promisors, recoverable by direct action therefor, without dissolution of partnership or adjustment of partnership accounts. 2 Lindl. Partn., bottom page 1350, latter part of note 2; T. Pars. Partn. 285 *et seq.*

If the defendants had given Haskins their promissory note for the sum so advanced, would it be urged that he could not maintain a suit thereon when due? I think not. Appellants make a contract in writing to repay two-thirds of all advances, which they agreed to pay at a certain date; thus clearly showing that it was not the intention that such advances should be considered as items in the partnership accounts to be adjusted with them. In Sprout *v.* Crowley, 30 Wis. 187, the court, after stating the general rule in regard to one partner maintaining a suit at law against his co-partner, says: "But, where there is an express agreement by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes thereby the debt of the partner who has thus agreed to pay the same, which may be recovered in an action brought directly therefor, without any regard to the partnership relation existing between the parties or the state of their firm accounts," — and cites numerous authorities in support of that proposition. The doctrine there laid down is reaffirmed in Gauger *v.* Pautz, 45 Wis. 449. The rule there laid down is applicable to the case at bar.

McAULEY ET AL. *v.* COOLEY.

45 Neb. 582: 63 N. W. 871. 1895.

RYAN, C. On the 12th day of October, 1888, J. H. Cooley and Geo. A. Bentley entered into a written agreement whereby they associated themselves as partners under the firm name of J. H. Cooley & Co., for the purpose of dealing in lumber. By the terms of this agreement, George A. Bentley's obligations were as follows: "The said

Geo. A. Bentley shall and he is hereby firmly bound to give all of his time, and use his best efforts, to promote the interest of their business. The said Geo. A. Bentley is to keep the books of the firm in a careful and workmanlike manner, and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be done equally out of the business; and Geo. A. Bentley to be allowed to draw for his personal expense a sum not to exceed forty dollars ($40) for each month, which amount shall be charged to his personal account, and come out of his share of the profits."

The plaintiffs in error, by their written undertaking in relation to the above contract, bound themselves as follows: "Whereas, on the 12th day of October, 1888, the above-bounden George A. Bentley and the said J. H. Cooley entered into a co-partnership for the purpose of carrying on the business of lumber and coal, etc., in the village of Holstein, in the County of Adams, and State of Nebraska: Therefore, the condition of this obligation is such that if the above-bounden George A. Bentley shall do and perform all the acts and requirements of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly to its spirit and terms, then this obligation to be void; otherwise to remain in full force and effect."

The firm of J. H. Cooley & Co. was dissolved about July 31, 1889. On the date last named it is clear from the evidence that the lumber owned by the firm was measured, and an invoice made. There was a settlement made between the individual members of the firm at or about that time, and the entries in the firm books by Bentley, being assumed to be correct, were acted upon by both parties as a reliable basis for a full settlement of the partnership matters. Not only was a settlement made at this time, but, pursuant thereto, all the assets of the partnership firm were turned over and transferred to J. H. Cooley. Upon the basis assumed, it was agreed between the partners that there was due from Bentley to Cooley the sum of $13. This action at law was brought for the most part to recover upon the bond signed by the plaintiffs in error the several amounts which Bentley had been paid and had failed to make a record of in the books of the co-partnership in any way. The allegations of the petition were very general, but were based upon the theory that for whatever sums Bentley had received to his own use and made no entry of in the books (which it was his duty accurately to keep) the plaintiffs in error were liable.

While the petition was perhaps less definite than it might have been, there was no objection made on that score; nor, indeed, do we understand that even now such objection is urged. The plaintiffs in error insist, however, that no suit at law could be maintained between the partners until a settlement had been had between them. There was

just such a settlement and an adjustment of the liability of each upon a false, misleading basis furnished by the partner, for the faithful performance of whose duties in that very respect the plaintiffs in error were liable. This action was not to wind up a partnership, but was for the failure of one partner to perform certain duties as he had contracted with another person to do them. True, these duties pertained to partnership affairs between the contracting parties; the undertaking in this respect was none the less that of Bentley individually, and for faithful performance of such individual undertaking plaintiffs in error were liable. There was sufficient evidence to sustain a finding that the failure of Bentley to account for moneys received by him had resulted in damage to Cooley to the amount found by the court. . . .

The judgment of the District Court is affirmed.

MASON ET AL. *v.* SIEGLITZ.

22 Colo. 320: 44 Pac. 588. 1896.

ACTION by Sieglitz against Mason and others, for one-third of the commissions received upon the sale of the Brush-Heap mining property, plaintiff claiming that under an agreement between him, defendant Mason, and one Moorman, they were to share equally in the commissions of said sale. Defendants appeal from a judgment for plaintiff.

W. C. Kingsley, for appellants.

Stuart & Murray, for appellee.

CAMPBELL, J. . . . We proceed to consider such of the errors assigned as we think properly raised.

1. It is said that this action cannot be maintained, for the reason that the complaint shows that there was a partnership between the parties to this agreement, and that one partner cannot sue another for a debt growing out of a partnership transaction, but that the proper action is one for a dissolution of the partnership and for an accounting. We do not find that this objection was properly taken by the appellants at either trial, and we might, for this reason, properly refuse to consider it here. But the agreement in this case related to a single transaction. The parties to it evidently did not intend to form a partnership, and the profits of the transaction were in no sense to be applied to their joint account, but one-third of whatever profit was obtained went to each one of the parties separately. The intention of the parties is not necessarily decisive, particularly when the language of the agreement is inconsistent with such intention; but the intention of the parties is always very material in determining whether or not a partnership *inter sese* exists, and even as to third parties. We do not consider that the agreement as to the commissions for this sale consti-

tuted the parties partners. See 1 Chit. Cont. (11th Am. ed.) 320, and notes; 1 Lindl. Partn. 18; 17 Am. & Eng. Enc. Law, 857; Wheeler *v.* Arnold, 30 Mich. 304; Wass *v.* Atwater, 33 Minn. 83.

But if there was a partnership, there being but one item unadjusted, the kind of action brought by the plaintiff would lie at common law; and under the Code, there being but one form of civil action, if the facts set up in the complaint entitle the plaintiff to any kind of relief, if the evidence warrants it, such relief will be awarded. Wann *v.* Kelly, 5 Fed. 584; Wheeler *v.* Arnold, *supra;* Meason *v.* Kaine, 63 Pa. St. 335; Sikes *v.* Work, 6 Gray, 433; Pettengill *v.* Jones, 28 Kan. 749; Galbreath *v.* Moore, 2 Watts, 86; Buckner *v.* Ries, 34 Mo. 357. There is nothing in this contention. . . .

Judgment affirmed.

WILSON *v.* WILSON ET AL.

26 Or. 251: 38 Pac. 185. 1894.

WOLVERTON, J. The questions suggested by this record are two. First, where one gives a promissory note to his retiring partner, covering partnership funds advanced by the partner so retiring, and used in the business, can failure of consideration based upon the alleged facts that no final settlement has ever been had of the partnership affairs, and that upon such settlement there would be nothing due thereon, be shown in defence to an action at law upon said note. . . . 1. It is contended that when the $1,800 for which the note was given was put into the business by Daniel Wilson, being a contribution to the capital invested, it became the property of the partnership; that this investment or property constitutes the consideration for the note in question; and that being the property of neither party, but of the co-partnership, it could not constitute a consideration moving from Daniel Wilson to the defendants, and therefore would not support a note. The purpose of the evidence offered and refused was to show that, at the time this note was given, there had been no settlement, either partial or complete, of the partnership business, and that, upon a final settlement of the partnership, there would be nothing due the plaintiff. It is alleged in defendants' answer, however, that Daniel Wilson, after he had expended about $2,380, withdrew from the partnership, and that W. C. Wilson promised to pay him this amount on condition that he should make it out of the mine. The note in contest was thereupon executed, covering $1,800 of this $2,380. So that it may be reasonably inferred from the answer and the proofs offered that there was a dissolution of the partnership at the time the note was executed, although no final settlement of its affairs was had. W. C. Wilson thereafter continued in possession of the mine, working it every year since, and enjoying the benefit of the funds expended thereon in making the necessary

improvements to put it in a working condition; but this does not answer the defendants' contention that the consideration of the note was funds that the partnership had received, and not the defendant, W. C. Wilson. Unless there has been, by some act of the parties, a segregation of such funds from the general partnership property, and an appropriation thereof by the defendant, W. C. Wilson, for which he and his co-defendant executed their note to Daniel Wilson, there is, in fact, no sufficient or legal consideration to support the note. If a person receives funds or property of a partnership of which he is a member, he becomes a debtor to the partnership, and not to the other members thereof; and so, if one partner loans money to the partnership, he becomes a creditor of the partnership, and not of the remaining members. In neither case could an action be maintained by or against the partnership. This is so, for the obvious reason that it is not permissible for a party to sue himself.

It is also true, as a general rule, that until the accounts of the partners are finally adjusted, or until the affairs of the firm are so far settled as that nothing remains to be done by it or its members except to ascertain the final state of the account between the partners, no action can be maintained by one partner against the other in respect of particular items of account pertaining to the partnership business. But there are exceptions to this general rule, and a prominent one is where the sum sought to be recovered is separated from the partnership account. 1 Colly. Partn. § 258; Bonnaffe *v.* Fenner, 6 S. & M. 212; 45 Am. Dec. 278. So a partner may sue his associate at law upon a note or duebill given him on a partial settlement of the partnership affairs. Sturges *v.* Swift, 32 Miss. 239. The giving of a promissory note by one partner to another is an isolation of the demand in respect of which the note was given from the general partnership account. 2 Lindl. Partn. * 565; 1 Colly. Partn. § 257; Bonnaffe *v.* Fenner, *supra;* Merrill *v.* Green, 55 N. Y. 270; Griggsby *v.* Nance, 3 Ala. 350, 351; Scott *v.* Campbell, 30 Ala. 728. Chief Justice Marshall, in Van Ness *v.* Forrest, 8 Cranch, 33, says: "It is alleged that, at law, one partner can sue another on a claim growing out of the partnership in no other case than for a general balance on a stated account. The terms in which this proposition has been laid down are, perhaps, too general. In the case at bar, the suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable on the note itself. . . . The principle that a company cannot sue its members does not apply to the case; nor does the principle that a partner cannot sue a partner on a partnership transaction apply to any case where a note in writing is given for money, not to a firm, but to an individual member." So it would appear that an action at law is maintainable by one partner against another upon a promissory note executed by the one to the other, involving particular items or transactions of the partnership

business, upon the ground that the giving of the note is an isolation or separation of the particular matter from the general partnership account, and that an accounting and final settlement of the partnership affairs is not necessarily involved in such action; that the execution of the note is such an acknowledgment of isolation or elimination of the particular transaction from the general partnership account as that the maker will be estopped at law from questioning the holder's right of action thereon.

2. We are aware of authorities which hold that a promissory note given by one partner to another in settlement of particular transactions of a partnership, prior to the final settlement and adjustment of the general partnership affairs, will not support an action at law; that, the maker being under no legal or equitable obligation to pay that for which the note was given, it is therefore a mere *nudum pactum*, and can have no greater force or effect than an express promise would have if made under like circumstances in any other form. Of such are Martin *v.* Stubbings, 20 Ill. App. 398; Stafford *v.* Fargo, 35 Ill. 481; and Sewell *v.* Cooper, 21 La. Ann. 582. Without attempting to distinguish or criticise these cases, we note that in all of them the doctrine is maintained that it is sufficient to defeat an action upon a note given by one partner to another, to answer that the note was based upon transactions touching the business in which the partners were engaged as such, and that no final accounting or settlement of partnership affairs has been had, and that a mere showing of this state of affairs will defeat the action at law. This recognizes a sort of an equitable plea in abatement which, in effect, bars the action. It is altogether clear that an accounting between partners cannot be had at law, and, upon principle, a mere suggestion that an accounting is necessary ought not to defeat an action when the parties have, by giving and taking a promissory note, expressly recognized that a right of action at law exists. If equitable reasons exist why a defendant should not pay his note in whole or in part, the remedy in equity is ample. (After citing Burns *v.* Scott, 117 U. S. 586; Mitchell *v.* Wells, 54 Mich. 129; and Sturges *v.* Swift, 32 Miss. 239, to the proposition that defendant's relief is by injunction until a settlement of the firm affairs is had, the learned judge continued:) Under our statute, such equitable relief may be had by way of cross-bill in equity. . . . The defendants have given the right of action at law by the execution and delivery of their promissory note, and the remedy adopted by plaintiff is available to him unless restrained by a competent equitable tribunal, for which the law has made ample provisions. . . . *Affirmed.*

GLADE *v.* WHITE.

42 Neb. 336: 60 N. W. 556. 1894.

Irvine, C. . . . The petition alleged, in substance, that the plaintiff and defendant had been partners; that the partnership was dissolved in December, 1888, at which time all claims as they appeared on the books of the firm were bought by the plaintiff; that the books were not in all instances correct; that in November, 1888, the defendant had drawn a check upon the bank account of the firm, amounting to $118.45, and appropriated its proceeds to his own use without accounting therefor; that the defendant had obtained possession of certain grain (describing it), which he had appropriated to his own use, and not accounted for; and that certain accounts had been collected by the defendant, and the money not turned over to the plaintiff. While the petition is not very artistically drawn, it does charge that there had been a partnership; that there had been a dissolution; that by the dissolution the plaintiff had become entitled to the indebtedness owing the firm; and that certain items of this indebtedness the defendant had collected and appropriated to his own use. The allegations in regard to the appropriation of the grain may be disregarded. If they belonged in a separate account, the remedy was by a motion to require a separate statement, and, if the averments in regard to the accounts would in themselves be sufficient against demurrer, those in regard to the grain were at most surplusage.

The demurrer was upon three grounds: First, that plaintiff has not legal capacity to sue; second, that the court had no jurisdiction of the subject matter; third, that the petition did not state facts sufficient to constitute a cause of action.

We hardly understand upon what theory the defendant contends that the plaintiff had not legal capacity to sue. Certainly, no incapacity is disclosed in the petition. It would seem from the argument that the only point claimed under this head is that the petition discloses that the action concerned partnership matters, and that therefore the plaintiff could not sue at law. This objection does not go to his legal capacity, and will be considered in connection with the third assignment of the demurrer.

It is urged that the County Court had no jurisdiction of the subject matter, because, if the petition did state a cause of action, it must be one in equity for an accounting, and the County Court has no jurisdiction of such cases. The petition does not state a case for an accounting. It must stand or fall as an action for the recovery of specific sums of money, and therefore, if it does state a cause of action, it is clearly one within the jurisdiction of the County Court, less than $1,000 being claimed. But we wish here to take occasion to say that the jurisdiction of the County Court does not depend upon the old distinctions between actions at law and in equity. . . .

Does the petition state facts sufficient to constitute a cause of action? It has been recently held that an action at law cannot be maintained by one partner against his co-partner, to recover moneys alleged to be due him on account of partnership transactions, where no settlement of the partnership accounts and business has been had. Lord *v.* Peaks, 41 Neb. 891. This case declares that the general rule in such matters is in force in this State. In view of the abandonment here of technical distinctions between law and equity, the rule means that a petition under such a state of facts must, in order to state a cause of action, present a case for dissolution or accounting, and that single transactions cannot be selected and made the basis of independent suits. The reasons for this rule are by a late writer summarized as follows: That the mutual balances fluctuate, and to permit actions on single transactions would disregard the rights of other partners on the state of their accounts; that such actions would lead to a multiplicity of suits; that the ascertainment of balances requires an examination which cannot be safely submitted to a jury; that actions by one partner, if enforceable, would be to appropriate partnership property to the exclusion of creditors, and in violation of the liens of the others; that such an action would be really against the firm, and a partner suing would be on both sides of the record; and that the debt would be partnership assets not collectible by one member. Bates, Partn. § 849. This petition avers a state of facts which removes all of these objections. It avers that the partnership had been dissolved; that the indebtedness due the firm had been purchased by plaintiff, and was therefore no longer partnership assets. The petition in effect alleges the partnership transactions merely by way of inducement and charges, in substance, that the defendant had received certain moneys which, *ex aequo et bono*, belonged to the plaintiff. This would make a case for money had and received under the old procedure. The authorities support this view. Thus, on the settlement of partnership matters, there was a disputed item which one of the partners alleged he had paid to a third person for the other partner, and promised to pay it to him if the third person did not. A settlement was made on that basis, the item being charged to the partner for whom it was claimed to have been paid. It was afterwards learned that the money had not been paid to such third person, and it was held that the partner to whom the amount had been charged could recover the same against the other partner in an action at law. The court said: "On allowance of it by Funk, moved thereto by the false pretence of Adams, it became money in Adams' hands for the use of Funk, and for which he could maintain an action for money had and received." Adams *v.* Funk, 53 Ill. 219.

Russell *v.* Grimes, 46 Mo. 410, was a case very similar to the present. There had been a partnership accounting by action, in which the debts due the firm were divided between the partners. Thereafter it was ascertained that one of the partners had collected a portion of certain notes payable to the firm, which had been turned in to the other

partner at their face. The court said: "The petition so far does not seek to settle the partnership accounts, nor does it attack the settlement already made. It simply charges the defendant with having received money upon claims which, by the settlement, became the individual property of the plaintiff; and the plaintiff then acquired a separate property, not only in the balance due upon those claims, but, as against his partner, to their full amount." It was held that a petition charging such facts stated a cause of action. To the same effect are Ross *v.* West, 2 Bosw. 360; Crosby *v.* Nichols, 3 Bosw. 450; Wicks *v.* Lippman, 13 Nev. 499. The case of Russell *v.* Grimes, *supra*, contains language and reasoning supporting the petition in this case, both as to the moneys received and the appropriation of specific property. We think the petition stated a cause of action, and that the judgments of the district and county courts were right.

Affirmed.

DAVIS, J., IN NEWBY *v.* HARRELL ET AL.

99 N. C. 149. 1888.

In this case the instructions asked for were substantially given, except the first, and that presents the question: Can one partner maintain an action against a co-partner for injury to his separate and individual property used in the co-partnership business, if such injury is the result of negligence or tort of the co-partner?

It may be laid down as a general rule, that before one partner can sue another at law, the settlement of the firm must be complete, and his right to recover only arises after a settlement of all partnership business. Graham *v.* Holt, 3 Ired. 300, or as laid down by Collyer on Partnership, § 269, one partner cannot maintain an action against a co-partner to recover money, when the sum sought to be recovered might be placed as an item in the partnership account. Among the exceptions to the general rule is the right of one partner to maintain an action against another for the destruction of the joint property, or its wrongful conversion. Lucas *v.* Watson, 3 Dev. 398; Colly. on Partn. § 382. If one partner may maintain an action against another for the destruction of the joint property, *a fortiori*, may the action be maintained when the property destroyed is the individual property of a partner used in the business of the partnership?

CHAPTER VII.

DISSOLUTION OF PARTNERSHIPS.

§ 1. By Operation of Law.

GRISWOLD et al. v. WADDINGTON et al.

15 Johnson (N. Y.), 57. 1818.

Action of assumpsit to recover a balance of account arising on transactions between the plaintiffs, citizens of the United States, and the firm of Henry Waddington & Co., during the late war between this country and Great Britain. Verdict for the plaintiffs for $17,757.09, subject to the opinion of the court.

Griffin and *Colden*, for the plaintiff.

Wells and *T. A. Emmett, contra.*

Spencer, J. This cause has given rise to several novel and important questions; and when the interesting results, growing out of these questions, are duly estimated, it is impossible to approach them without great solicitude and anxiety.

In considering this cause, I have found it nnecessary to decide some of the points which were ably discussed by the counsel; for, having arrived at a satisfactory conclusion on one of them, which must be decisive as to the plaintiff's claim, I have considered it unnecessary to express any opinion on the others.

Upon the fullest reflection which I have been able to give to the subject, my opinion is that the declaration of war between the United States and Great Britain produced a suspension during the war, or, *ipso facto*, a dissolution of the partnership previously existing between the defendants, so that the one is not responsible upon the contract, express or implied, of the other. It will be perceived that this proposition assumes the fact that the partnership between the defendants had not become dissolved by the efflux of time, or the acts of either of the partners, although this point is, in itself, very questionable. The better conclusion from the evidence is, that the partnership expired by its own limitation during the war; that the existence of the war would, at all events, dispense with the public notice which is, in general, necessary to the valid dissolution of a partnership.

The case discloses that the firm of Henry Waddington & Co. consisted of Henry and Joshua Waddington, that Henry is a British subject, resident, before and during the war, in London, conducting the partnership concerns there, whilst the defendant was resident here. The negotiations which gave rise to the present suit took place in

England, and exclusively with Henry Waddington, during the late war between this country and Great Britain.

It was admitted on the argument, and so the fact undoubtedly is, that the proposition I have advanced is neither supported nor denied by any judicial decisions or elementary writer of the common law; but if I mistake not, it is supported by the strongest reasons, and by necessary analogy with adjudged cases.

The first inquiry is, What are the objects and ends of partnerships? They are entered into with the view, that, with the joint funds, skill, and labor of the several partners, the interests of the concern may be advanced and promoted. There may be, and frequently are, different inducements influencing each partner: one may have more capital and credit; another may have more skill, activity, and experience. The one may choose to be a dormant and inert partner, furnishing an equivalent for the services and skill of the other, and leaving the business entirely to his control and management. But, unexplained as this partnership is, we must understand it to be, a union with a view to the employment of the joint capital, labor, and skill, of both the partners, for the purposes of internal and external commerce between this country and Great Britain. That the object of the partnership embraced both these objects of internal and external trade, would seem to be unquestionable from the local position of the partners.

That the death, insanity, and bankruptcy, of one of the partners, operates as a dissolution, was not questioned in the argument; and a respectable elementary writer, Mr. Watson, is of the opinion that the marriage of a *feme sole* partner would produce the same consequence. The cases of Pearce *v.* Chamberlain, 2 Ves. 33, and Sayer *v.* Bennet, Watson, 382, and several other cases cited by him, all go to establish the general principle, that death, insanity, and bankruptcy work a dissolution of partnerships; and they proceed on the principle, that the other partners are not bound to admit the representatives of a deceased or insane partner into the concern, the confidence having been originally placed in the personal skill and assistance of those no longer able to afford it.

Let these principles be applied to the present case, and it would seem that the same result is inevitable. In what situation did the war put the defendants, as regarded each other? Most undeniably, the two nations, and all their citizens, or subjects, became enemies of each other, and the consequence of this hostility was, that all intercourse and communication between them became unlawful. This is not only the acknowledged principle of the law of nations, but it is also a part of the municipal jurisprudence of every country. I need not cite cases in support of a position, which has so repeatedly been recognized in the English courts, and in our own, possessing as well admiralty as common law jurisdiction. Another consequence of the war was, that the shipments made by each of the partners would be liable to capture and condemnation, by the cruisers of the government of the other; and another

very serious evil attended them; no debts contracted in the partnership name could be recovered in the courts of either nation; they not having, in the language of the law, a *persona standi in judicio* whilst they were amenable to suits in the courts of both nations. The Hoop, 1 Rob. 201. It is true, the same disability to sue for debts due the firm antecedent to the war, would exist. This, however, does not weaken the objection; it remains still an important item, in considering whether a partnership exists, when the new debts created are to be liable to the same disability. It appears that Joshua Waddington is a citizen of the United States; and it has been already mentioned that Henry Waddington is a British born subject. They owed different allegiances, and it became part of their duty to lend all their aid in a vigorous prosecution of the war, the one to the United States, and the other to Great Britain; and it appears to me, that it would not comport with policy or morality, that the law should imperiously continue a connection, when, by its very continuance, it would afford such strong inducements to a violation of that fidelity which each owes to his government. .

Again, all communication and intercourse being rendered unlawful, and it being a well-established principle that either partner may, by his own act, dissolve a partnership, unless restrained to continue it for a definite period by compact, in what manner could such intentions be manifested during the war? It might, indeed, be made known to the public of one of the countries, but it could not be notified to the public of the hostile country; and thus, unless the war produced a dissolution, he would be responsible, notwithstanding he had the desire to dissolve the connection, merely from inability to make known that determination; an inability produced by events utterly uncontrollable. When the objects and intentions of a union of two or more individuals, to prosecute commercial business, are considered; when it is seen that an event has taken place, without their fault, and beyond their control, which renders their respective nations, and, along with them, the defendants themselves, enemies of each other; that all communication and intercourse has become unlawful; that they can no longer co-operate in the conduct of their common business, by affording each other advice, and are kept hoodwinked as to the conduct of each other; that the trade itself, in which they were engaged, has ceased to exist; that, if they enter into any contracts, they are incapable of enforcing their performance by an appeal to the courts; that their allegiance leads them to support opposite and conflicting interests; — I am compelled to say that the law cannot be so unjust as to pronounce that a partnership, so circumstanced, when all its objects and ends are prostrated, shall continue; and with the clearest conviction upon my mind, and in analogy to the cases to which reference has been made, I have come to the conclusion, that the partnership between the defendants was, at least, suspended; and I incline to the opinion, that it was, *ipso facto*, dissolved by the war, and, consequently, that the defendant Joshua Waddington is not liable to this action. . . .

It has, too, been strongly put that the plaintiffs contracted this debt with the firm on the faith that Joshua Waddington was a partner, and that he ought to have publicly communicated the dissolution of the partnership. I am perfectly satisfied that Joshua Waddington has acted in good faith; there is no pretence that he has done anything to mislead the plaintiffs, or the public, unless his silence be so considered. If the law worked a suspension or dissolution of the partnership, every person dealing with Henry Waddington was bound to take notice of that fact; and with the old dealers of the firm there was knowledge of all the material facts which enter into determination of the cause.

Judgment for the defendant.[1]

MARLETT v. JACKMAN ET AL.

3 Allen (Mass.), 257. 1861.

CONTRACT upon a promissory note for $1,000, dated Boston, June 30, 1855, signed "Jackman, Hathaway, & Co.," payable to the order of William J. Marlett in six months after date, at the Bank of Syracuse, New York, and by him indorsed to the plaintiff. Jackman and Hathaway alone defended the action, and in their several answers set forth, among other things, that if any such firm as Jackman, Hathaway, & Co. ever existed, it had expired and was dissolved before the note was given.

At the trial the plaintiff introduced evidence tending to show that in 1852 and 1853 the defendants Jackman and Hathaway, together with Ivory Chick and H. B. Leach, were partners under the firm of Jackman, Hathaway, & Co., and engaged in constructing railroads; and that the note in suit was signed with the name of the firm by said Leach at Boston on the day of its date. The defendants introduced evidence to show that Ivory Chick died on the 8th of March, 1854, and asked the court to instruct the jury that his death dissolved the firm, and that they were not liable to pay a note signed by him afterwards without their consent or knowledge. The judge instructed the jury that although Chick died before the note was signed, and his death dissolved the firm, and his estate would not be liable for debts subsequently contracted by a surviving partner in the name of the firm, yet the other surviving partners would be bound by the act of Leach in signing the note in suit, unless William J. Marlett had been notified or had knowledge of Chick's death at the time of taking it.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

S. Bartlett & J. W. Hubbard, for the defendant Jackman.

G. Putnam, Jr., for the defendant Hathaway.

T. L. Wakefield & J. Lathrop, for the plaintiff.

[1] Affirmed, 16 Johns. 438.

Bigelow, C. J. It is certainly somewhat remarkable that no case can be found either in this country or in England in which the question has arisen and been adjudicated whether, in case a co-partnership is dissolved by death, the surviving partners are bound to give notice of such dissolution, in order to avoid a liability occasioned by the subsequent misuse of the co-partnership name by one of the firm. The adjudged cases have gone no further than to hold that neither the estate of the deceased partner nor his heirs or personal representatives can be held on a contract entered into in the name of the firm subsequently to his death, although no notice of the dissolution of the firm has been given. Vulliamy *v.* Noble, 3 Meriv. 614; Webster *v.* Webster, 3 Swanst. 490 and note; Caldwell *v.* Stileman, 1 Rawle, 212; Washburn *v.* Goodman, 17 Pick. 519, 526. Two text writers, however, of great learning and authority have laid down the rule that where a co-partnership is dissolved by the death of one of the co-partners, no notice of the dissolution is necessary, and that the surviving members are not bound by any new contract entered into by one of the firm in the co-partnership name after such dissolution, although it is made with a person who had previously dealt with the firm and had no notice or knowledge that it was terminated by the death of one of the members. 3 Kent, Com. (6th ed.) 63, 67; Story on Partn. §§ 319, 336, 339. The same doctrine is stated by the American editor of Colly. Partn. (3d Amer. ed.) §§ 120, 538. In determining judicially whether this statement of the rule is correct, we must take into consideration the nature of the relation of co-partners between themselves and towards third persons, and endeavor to ascertain whether the doctrine of the text writers is supported by analogy, and consistent with the general principles on which the law of partnership is founded.

Starting then with the admitted proposition that death works an immediate dissolution of a firm, and that thereby the estate of the deceased partner and his personal representatives, as well as his share of the assets of the firm, are absolutely relieved and absolved from any new contracts or subsequent transactions of the surviving partners which are not necessary to the settlement of the joint business, the inquiry at once arises as to the effect of such a dissolution occasioned by the act of God on the relative rights and duties of the surviving co-partners. One of the essential elements of a contract of co-partnership consists in the right which each member has to the continuance of all his associates as members of the firm. If one withdraws, the co-partnership is at an end. The *delectus personarum* lies at the foundation of the agreement of the parties, and is one of the main considerations on which it rests. The personal qualities of each member of a firm enter largely into the inducements which lead parties to form a co-partnership; and if the abilities and skill, or the character and credit, of any one are withdrawn, the contract between them is terminated and the co-partnership is dissolved. When, therefore, by the death of a member of a firm, his personal liability ceases and his estate is by

operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow, as a necessary consequence, that the power of the surviving co-partners to bind each other by new contracts and engagements must at once cease. The co-partnership would then be terminated not only as to the deceased partner and his estate, but also as to the other members of the firm. The *delectus personarum* would no longer exist. The contract of co-partnership did not confer any power or authority on the several co-partners to bind each other individually, or to act in behalf of any number of them less than the whole. The co-partnership constituted the principal; and the several co-partners were agents, not of the different persons comprising the firm, but only of all taken together and forming one body united in a community of interest for common objects. If then the members of the firm are held to be bound by a contract entered into by one of the co-partners in the name of the firm after its dissolution by the death of a member, such liability does not arise or grow out of the agreement of co-partnership. On the contrary, it is directly adverse to the nature and spirit of the contract between the parties. No such agency was created by the formation of the co-partnership. It presents the anomaly of holding a party responsible for the act of an agent after the principal — the co-partnership — had ceased to exist, and all authority to act in its behalf had been revoked by the act of God.

On what principle, then, can it be maintained that the law fastens on persons an obligation to answer for contracts entered into in the name of a principal who has ceased to exist, by one whose authority to act is absolutely terminated? The only answer that can be made to this question by those who seek to sustain the obligation of such contracts on the surviving members of the firm is, that a duty is devolved on them to give notice of its dissolution by the death of one of their associates, and that an omission to give such notice renders them liable in the same manner as if the co-partnership had not ceased to exist. This is doubtless the rule in cases where the dissolution is effected by the voluntary act of the parties, or results from any state of facts not public or notorious in their nature, and which are more peculiarly within the knowledge of the members of the firm. But it rests on the principle that the co-partners are guilty of negligence in leaving the world in ignorance of such facts, which third persons cannot be supposed to have the means of ascertaining, and allowing them to infer that the co-partnership continues, and to put faith and confidence in the name of the firm in consequence of such belief. 3 Kent, Com. 66; Story on Partn. § 160. In determining on which of two parties a burden or a loss is to rest, the law always seeks to ascertain whether either has been guilty of any neglect or omission, which has misled the confidence or operated to deceive the other, and requires that the responsibility shall be placed on the one who has failed to do that which was necessary in the exercise of due diligence or fair dealing. But this

salutary principle is not applicable to the case of a dissolution of a co-partnership by the death of one of its members. The cause of such a termination of the co-partnership is not the voluntary act of the members. It does not result from any private transaction between them, nor from any occurrence or fact peculiarly within the knowledge of the surviving members of the firm. On the contrary, the death of a co-partner may often occur under circumstances in which the knowledge of the event may not come to his associates for a long period of time. He may have been lost at sea, or have died in a distant land. In such a case, if the co-partnership is held to continue as to the surviving co-partners until notice of the death is given by them, it is obvious that they might be held liable on contracts entered into by one of their number long after the co-partnership was dissolved among themselves by operation of law; after the estate and effects and personal credit of the deceased co-partner had been withdrawn, and the power and authority of any of the firm to bind his associates had been revoked. And this, too without any neglect or omission which could be imputed to them, and when they were in the position of innocent parties who had done no act to mislead or deceive others, and had not ever made the contract on which they are to be held liable.

To parties thus situated, the more just and reasonable rule would seem to be applicable, that where two parties stand toward each other *in aequali jure*, and neither has been guilty of any negligence or want of good faith, their respective rights must be settled by the application of the strict rule of law, without reference to any supposed equities arising from the occurrence of an event, which neither party anticipated or could prevent. Certain it is, that the reason of the rule which requires in cases of the dissolution of a firm caused by the voluntary act of the parties, or by circumstances which would necessarily come within the knowledge of the co-partners but might be unknown to third persons, that notice of it should be given in order to relieve the members from future responsibility, does not apply where the co-partnership is terminated by death. The true doctrine on this point is well stated by Mr. Bell, in his learned Commentaries on the Laws of Scotland. "The opinion has certainly prevailed very generally that no notice is necessary; that the partnership, according to the common course of the law, is dissolved by death; that those who deal with the company are held to know the state of their debtor; and that the publication of all deaths, according to the common custom of the world, places this sort of information within the reach of ordinary care and diligence." 2 Bell, Com. (4th ed.) § 1234. The same principle is stated in a case adjudicated by the Court of Session in Scotland subsequently to the publication of Mr. Bell's learned treatise. "Death operates a dissolution of itself; and, being a public fact, all men are bound to know it." Christie *v.* Royal Bank, Cases in Court of Session (1839), 745, 765. In this respect, the consequences of a dissolution by death are the same as one occasioned by war between two countries of which co-partners

are respectively citizens. No notice is required to be given when a fact is of a public nature. Griswold *v.* Waddington, 15 Johns. 57; s. c. 16 Johns. 438. Nor can it make any difference as to this liability of the survivors, that they knew of the death of their co-partner and omitted to give notice of it to the person with whom the new contract was made. As the fact of death was not in its nature private or confined within the knowledge of the members of the firm, the presumption is that third persons also had notice of it. Therefore the liability of survivors upon a new contract, not entered into by themselves, but by one of their associates without their knowledge or assent in the name of the firm, cannot be made to depend on the question whether they had previous notice of the death. They ought not to be held liable for omitting to give notice of that which others are supposed to know. And although the member of the firm who actually enters into a contract may be responsible, as upon a contract made by himself individually, or on the ground that by making it in the name of the firm after its dissolution, he by implication represented a fact to be true which he knew to be false, or which he did not know to be true, and thereby caused loss or injury to an innocent third party, there is no good reason for holding the other co-partners liable, who have remained passive and done no act by which third parties have been deceived or misled, or induced to change their position or to part with their property.

The doctrine which we have stated is the only one which is consistent with the law of agency, of which the rules regulating the acts of co-partners form an important branch. So far as a co-partner acts for the firm in transactions with third persons, he is only an agent; and his rights, duties, and obligations are governed by the same principles as those which are applicable to ordinary agents who have no interest in common with their principals. By the well-settled rule of the common law, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not; and no notice is necessary to relieve the estate of the principal of all responsibility, even on contracts into which the agent had entered with third persons who were ignorant of the death of the principal. Those who deal with agents are held to assume the risk that his authority may be terminated by death without notice to them. Story on Agency, § 488; Blades *v.* Free, 9 B. & C. 167; Smout *v.* Ilbery, 10 M. & W. 1; Campanari *v.* Woodburn, 15 C. B. 400. On the other hand, if the agency is terminated by the act of the principal, he is required to give notice of the revocation of authority in order to relieve himself from responsibility; because having held the agent out to the world as authorized to act in his behalf, it would be a breach of good faith to permit innocent parties to deal with him in ignorance of a fact which could not be known to them without notice. It would certainly be a strange inconsistency in the law, if a different rule was applicable to an agency arising out of a contract of co-partnership, when it is terminated by a like cause. The reason on which the rule is founded applies with equal force,

whatever may have been the nature of the authority under which the agent acts.

Nor are we able to see any good reason for imposing a duty of giving notice of the dissolution of a firm on surviving co-partners which is not applicable to the representatives of the deceased partner. But the rule is well settled that no notice need be given by the latter to relieve his estate from liability on future contracts. If it be said that the surviving co-partners are in possession of the books and papers of the firm, and therefore have access to means of ascertaining the names of persons with whom the firm have dealt, which are not within the reach of the heirs or representatives of the deceased co-partner, the answer is, that this does not afford any ground for exempting the latter from the duty of giving public notice of the dissolution of a firm by death by advertisement in a gazette, nor of informing the surviving co-partners, whom they must be supposed to know, of the fact. It would seem to be quite as reasonable that notice of the death of one of the co-partners should be given to the surviving members of the firm by the heirs or personal representatives of the deceased, before his estate is discharged from all claim for contribution or aid in performing contracts entered into by the surviving co-partners before they received notice of his death, as that they should be required to give notice to third persons before they can be exempted from liability. But no such notice is required. The co-partnership ceases immediately on the death of any one of its members as between all the co-partners, without any notice. This is an adjudicated point. We can see no good reason for holding that it is not also terminated as to third persons.

The case of Pitcher *v.* Barrows, 17 Pick. 361, cited for the plaintiff, has no bearing on the question at issue in this case. The dissolution in that case was effected by the conveyance by one co-partner of his share and interest in the firm to his co-partners. It was a private transaction, known only to the members of the firm, of which third parties could have no notice until it was made public by those who were alone cognizant of it. The true distinction is not that no notice is requisite when the dissolution takes place by operation of law, but only when it is effected by circumstances or an event of a public or notorious nature, of which all men in the exercise of due diligence are required to take notice.

The rule of the civil law which was referred to by the counsel for the plaintiff is essentially different from that of the common law. The effect of the death of a principal under the civil law is not to revoke the authority of the agent. He can bind the estate of his deceased principal until notice of the death is given. Following out this analogy in cases of the death of a co-partner, the rule of the civil law is that the heirs of the deceased co-partner are liable on contracts made in the name of the firm by the surviving co-partners, if they had no knowledge of the death of their associate, or if the persons with whom they dealt were ignorant of the dissolution. Pothier, Soc. §§ 156, 157.

It is not necessary in the present case to determine whether a surviving co-partner who enters into a contract in the name of the firm after its dissolution by death can be held liable in any form to the person who in good faith and in ignorance of the fact that the co-partnership is at an end has acted and dealt on the credit of the firm. That is not the question which was raised at the trial. But we do decide, for the reasons we have given, that a surviving co-partner cannot be held responsible on contracts made without his assent or knowledge by another co-partner after the firm has been dissolved by the death of one of its members, although no notice of its dissolution has been given to the person with whom the contract was made. . . .

New trial granted.

BASSETT *v.* SHEPARDSON.

52 Mich. 3. 1883.

The plaintiff as administratrix of Olive L. Shepardson brought replevin against defendant for a team, harness, and wagon. These chattels had been furnished by the decedent to the defendant pursuant to a written contract, which provided that they were "for the express use of said drug business, and that said party of the first part (the decedent), and said party of the second part are to share alike in the profits of said drug business after all the expenses have been paid." Some months after this contract was entered into, defendant intermarried with decedent, and she died about six weeks afterward. Defendant refused to deliver the property to plaintiff on the ground that, as surviving partner in the drug business, he had the right to retain and dispose of it. Under the rulings of the trial court, the jury found for the defendant.

Plaintiff appealed.

Wilkinson, Post, & Wilkinson, for appellant.

George W. Coomer, for appellee.

Graves, C. J. . . . Admitting that the defendant and the decedent were brought into the partnership relation by the first agreement, the fact is certain that the subsequent intermarriage of the parties worked an instantaneous dissolution of the relation, Pars. Partn. 3d ed. 399–462, Lindl. Partn. 3d ed. 240–241, and the right over this property by the defendant ceased. The firm being dissolved, the privilege to use and hold the decedent's team, which was nothing more than incident, terminated at the same time. There was no longer a legal right. The subsequent possession was no more than a license which ceased at her death. Hence, the claim that the defendant was entitled to continue in possession as surviving partner had no basis. . . .

The judgment must be reversed with cost.[1]

[1] The statement of facts has been abridged, and a part of the opinion has been omitted.

§ 2. Dissolution by the Act of the Parties.

FLETCHER *v.* REED.

131 Mass. 312. 1881.

Morton, J. This is a bill in equity brought to settle the affairs of a partnership. The case having been referred to a master, the defendants filed numerous exceptions to his report, which were overruled by a single justice of this court, and an appeal taken to the full court.

1. The master finds that the co-partnership between the parties was formed by an oral agreement, for an indefinite time, to which finding no exception is taken. A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose. It follows that the master rightly ruled that the defendants were not entitled to be allowed for any damages which they contended were caused by the withdrawal of the plaintiff from the firm. . . . *Decree for the plaintiff.*

SOLOMON et al. *v.* KIRKWOOD et al.

55 Mich. 256. 1884.

Cooley, C. J. The plaintiffs, who are, in the city of Chicago, dealers in jewelry, seek to charge the defendants, as partners, upon a promissory note for $791.92, bearing date November 9, 1882, and signed "Hollander & Kirkwood." The note was given by the defendant Hollander, but Kirkwood denies that any partnership existed between the defendants at the date of the note.

The evidence given on the trial tends to show that on July 6, 1882, Hollander & Kirkwood entered into a written agreement for a partnership for one year from the first day of the next ensuing month, in the business of buying and selling jewelry, clocks, watches, etc., and in repairing clocks, watches, and jewelry, at Ishpeming, Michigan. Business was begun under this agreement, and continued until the latter part of October, 1882, when Kirkwood, becoming dissatisfied, locked up the goods and excluded Hollander altogether from the business. He also caused notice to be given to all persons with whom the firm had had dealings that the partnership was dissolved, and had the following inserted in the local column of the paper published at Ishpeming: "The co-partnership heretofore existing between Mr. C. H. Kirkwood and one Hollander, as jewellers, has ceased to exist, Mr. Kirkwood having purchased the interest of the latter." This was not signed by any one.

A few days later Hollander went to Chicago, and there, on November 9, 1882, he bought, in the name of Hollander & Kirkwood, of the plaintiffs goods in their line amounting to $791.92, and gave to the plaintiffs therefor the promissory note now in suit. The note was made payable December 15, 1882, at a bank in Ishpeming. When the purchase was completed Hollander took away the goods in his satchel. The plaintiffs had before had no dealings with Hollander & Kirkwood, but they had heard there was such a firm, and were not aware of its dissolution. They claim to have made the sale in good faith, and in the belief that the firm was still in existence. On the other hand, Kirkwood claimed that Hollander and the plaintiffs had conspired together to defraud him by a pretended sale to the firm of goods which the plaintiffs knew Hollander intended to appropriate exclusively to himself; and he was allowed to prove declarations of Hollander which, if admissible, would tend strongly to prove such a conspiracy.

The questions principally contested on the trial were — First, whether the acts of Kirkwood amounted to a dissolution of the partnership; second, whether sufficient notice of dissolution was given; and third, whether there was any evidence to go to the jury of an understanding between Hollander and the plaintiffs to defraud Kirkwood. The trial judge, in submitting the case to the jury, instructed them that Kirkwood, notwithstanding the written agreement, had a right to withdraw from the partnership at any time, leaving matters between him and Hollander to be adjusted between them amicably or in the courts; and for the purposes of this case it made no difference whether Kirkwood was right or wrong in bringing the partnership to an end; if wrong, he might be liable to Hollander in damages for the breach of his contract. Also, that when partners are dissatisfied, or they cannot get along together, and one partner withdraws, the partnership is then at an end as to the public and parties with whom the partnership deals, and neither partner can make contracts in the future to bind the partnership, provided the retiring partner gives the proper notice. Also, that if they should find from the evidence that there was trouble between Hollander and Kirkwood prior to the sale of the goods and the giving of the note; that Kirkwood informed Hollander, in substance, that he would have no more dealings with him as partner; that he took possession of all the goods and locked them up, and from that time they ceased to do business — then the partnership was dissolved. Further, that whether sufficient notice had been given of the dissolution was a question for the jury. Kirkwood was not bound to publish notice in any of the Chicago papers; he was only bound to give actual notice to such parties there as had dealt with the partnership. But Kirkwood was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and on this branch of the

case the question for the jury was whether Kirkwood gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note: if he did not, he would still continue liable.

The judge also submitted to the jury the question of fraud in the sale of the goods. The jury returned a verdict for the defendants.

I. We think the judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, "Is a right inseparably incident to every partnership. There can be no such thing as an *indissoluble* partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it." Skinner *v.* Dayton, 19 Johns. 513, 538. To the same effect are Mason *v.* Connell, 1 Whart. 381, and Slemmer's Appeal, 58 Pa. St. 155. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases.

II. The instruction respecting notice was also correct. No court can determine for all cases what shall be sufficient notice and what shall not be: the question must necessarily be one of fact. . . .

III. But we think the judge erred in receiving evidence of Hollander's admissions or declarations tending to show fraudulent collusion between him and the plaintiffs. The declarations of a conspirator may be evidence against his associates after the conspiracy is made out; but to receive them as proof of the conspiracy would put every man at the mercy of rogues. We find in this case no evidence of the conspiracy except in the statements of Hollander; and those having been erroneously received there was nothing on that branch of the case to submit to the jury.

For this error there must be a new trial.

§ 3. Dissolution by the Court.

ROSENSTEIN et al. v. BURNS et al.

41 Fed. 841. 1882.

Nelson, J. This bill is brought to procure a dissolution and winding up of the affairs of a partnership entered into between parties under a written agreement for the canning of fish and the manufacture of pomace and fish guano, and to continue for the term of five years from July 1, 1881. The co-partnership agreement provides that the plaintiffs shall furnish the capital with which to carry on the business, and shall furnish, also, all materials at cost; that the defendants shall have charge of and superintend the manufacturing department at the factory in Gloucester, keep correct books, and submit weekly statements of the business to the plaintiffs, make good and marketable goods, at the lowest possible cost, in such quantities as the plaintiffs should deem advisable; and that all goods made, except in certain specified cases, should be shipped to the plaintiffs, and be sold by them in New York. The grounds upon which the dissolution is asked for are the wilful and persistent neglect of the defendants to comply with the terms of the written agreement, that the business is being conducted at a great loss, and that the plaintiffs were induced to enter into the partnership, and contribute their capital to the concern, through certain false and fraudulent representations of the defendants as to the nature and extent of the business. The defendants demur to the bill for multifariousness and for want of equity.

Both grounds of demurrer must be overruled. The bill states a plain case for equitable relief. A partner is under no obligation to continue a member of a partnership when his co-partner persistently and wilfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm, and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his co-partner or from a failure of the business itself. So, if he has been induced to enter into a partnership contract through the deceit of his co-partner, he may withdraw whenever the fraud practised upon him become known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership.

The bill is not multifarious. It has a simple purpose, the dissolution and winding up of the concern. Though several grounds for relief are stated, yet they arise out of the same series of transactions, relate to the same subject matter, and can be conveniently settled in one suit. They are all properly joined in one bill. *Demurrer overruled.*

JURGENS *v.* ITTMANN ET AL.

47 La. Ann. 367: 16 So. 952. 1895.

NICHOLLS, C. J. Plaintiff alleges that the commercial firm of G. B. Ittmann, Jacob Ittmann, and the succession of G. B. Ittmann, is indebted to him in the sum of $2,031.50, with legal interest from judicial demand, and he prays for judgment against it *in solido* for that amount. The demand is based upon the allegation that the commercial firm of G. B. Ittmann was domiciled and doing business in New Orleans from 1881 down to the time it was dissolved by the interdiction of George B. Ittmann, in the summer of 1893, and during that time it was composed of Jacob Ittmann and George B. Ittmann; that plaintiff sold and delivered to said firm goods, wares, and merchandise at the dates, in the quantities and descriptions, and at the prices, set forth in an itemized statement and bill annexed to the petition, subject to certain credits, which, having been made, left as still due the amount sued for; that since the dissolution of the firm George B. Ittmann had died, and his succession was represented by his testamentary executrix. By the bill annexed it appears that the sales comprised in the statement began on January 19, 1892, and closed on the 23d of May, 1893.

The testamentary executrix filed an answer, pleading, after the general issue, that during the whole period covered by the dates of the alleged indebtedness of the defendant to plaintiff the said defendant, George B. Ittmann, was notoriously insane, to the knowledge of the plaintiff and his agents, and was incapable of contracting or of binding himself in any manner whatsoever; that said notorious insanity was patent to all coming in contact with him, and was of such a nature that no one dealing with him could be deceived as to his condition; that said insanity was continuous from the month of October, 1892, until his interdiction; that said insanity was the actual cause of his interdiction by the Civil District Court for the parish of Orleans by judgment pronounced July 12, 1893; that codefendant Jacob Ittmann had exclusive charge of the business with which the said alleged indebtedness is claimed to have arisen, and that George B. Ittmann was without capacity to bind himself in connection therewith, and that he was not chargeable therewith, and neither is his succession to be held. The defendant, in view of the premises, prayed that the suit, in so far as it relates to the succession of George B. Ittmann, be dismissed, and plaintiff's demand rejected. The District Court rendered judgment in favor of the plaintiff against the commercial firm of G. B. Ittmann and Jacob Ittmann and the succession of George B. Ittmann *in solido*, for the sum of $2,031.50, with legal interest from January 9, 1894, until paid. The testamentary executrix of the succession of George B. Ittmann has appealed.

We find in the transcript the following agreement: "It is agreed between counsel that the only issue in this cause is the notorious insanity *vel non* of George B. Ittmann, and the claim made that his succession is not liable for the goods sold by reason thereof. The other issues are taken out of controversy by the admissions that the partnership existed as charged; that the goods were sold and delivered to the firm as charged; that the prices were just and reasonable; that the goods were used and consumed in the business of the firm; and that the price thereof has never been paid. . . . [Signed] W. S. Benedict, H. C. Cage, Attorneys for Plaintiff. . . . Without waiving any legal deductions from the evidence adduced, above is agreed to. [Signed] James J. McLaughlin, Attorney for Succ. of George B. Ittmann."

The meaning of the reservation made by the attorney of the succession of Ittmann is explained by the position taken by him that the commercial partnership of "G. B. Ittmann" is, so far as it was based on articles of partnership, terminated, and expired in 1882, and that from that time forward it existed only from day to day by consent; that, being dependent upon its existence for consent, it necessarily could not endure beyond the time when the parties to it could consent to its continuance; that, therefore, as soon as either partner became incapable of consenting to its continuance, the partnership ended *ipso facto*, upon the other party being informed of his partner's incapacity. Counsel cite in support of this proposition a citation from 17 Am. & Eng. Enc. Law, 1102, 1103, to the effect that "the permanent insanity of a partner is a ground for decreeing a dissolution;" and, "if it is a partnership at will, . . . the date of notice is the date of dissolution." On reference to the volume cited, we find Mellersh *v.* Keen, 27 Beav. 236, and Robertson *v.* Lockie, 15 Sim. 285, 10 Jur. 533, quoted as the authorities in support of the statement made. We have been unable to find the authorities themselves, but the citation itself does not declare that a partnership at will ends *ipso facto*, as contended for by counsel, by the insanity of one of the partners, but refers to a notice to be given. This notice evidently must have conveyed the information that from that time forward the partnership would be held to be terminated. We think the defendant is mistaken in making a continuance of the relations between the Ittmanns dependent upon their consent from day to day to such continuance, and in making them terminate, *ipso facto*, on any particular day, when such consent should not have been also affirmatively given, or legally inferred to have been given, on such particular day. We are of the opinion that the course of conduct pursued for many years between the parties evidences a reciprocal consent to the creation, and the actual creation, of a "partnership" between them. True, no writing was passed showing its precise terms, or fixing any definite time for its duration; but a "partnership" was created and existed none the less, and the parties were

bound, *inter se* and to third persons, as if such writing had been executed and the rules governing "partnerships at will" would control. The "partnership" was one not resting on consent from day to day, and by force of such daily reiterated consent, but a continuing partnership, subject to termination only after notice, and under the rules of law relating to the dissolution of partnerships. Until formally or legally dissolved, it continued as a partnership. Alba *v.* Moriarty, 36 La. Ann. 680.

It is not alleged that any notice has ever been given either by the curator of George B. Ittmann, his presumptive heir, or his testamentary executrix to Jacob Ittmann, or by the latter to the curator, executrix, or heir, or by either to the public generally, or the customers of the firm. Matters were permitted by all parties in interest to follow the old course. Purchases were made and bills were paid as they always were, and no one was placed upon his guard. It is not claimed that the sales which form the basis of the account sued on were effected by George Ittmann, a man of weakened mind, and that they are open in any way to objections as to fairness or full consideration. On the contrary, defendant asserts that the business was conducted exclusively by Jacob Ittmann; that the prices charged were what the goods furnished were justly and reasonably worth, and that they were used in the business. The case comes to us freed from all complaint of fraud, deceit, overreaching, or injury to George B. Ittmann. We think it very clear that if the business conducted at the "Jewel of the South," in the interval between the time when it is claimed that George B. Ittmann became so mentally incapacitated as to render him incapable of entering into a contract and the period of his interdiction, was prosperous, — and we have no reason to believe that it was not, — the succession of George B. Ittmann is entitled to share in the profits, for Jacob Ittmann is in no position to contest that right. His status as a partner has been fixed. Neither the curator appointed to represent the interdict during his life, nor his presumptive heir, nor his testamentary executrix appear to have repudiated the idea of a continuance of the partnership, or to have done anything by which the succession has been or will be cut off from asserting rights as under a continuing firm. For aught we know to the contrary, it may, at this moment, be asserting such a claim. There is nothing in the pleadings going to negative its right so to do. The testamentary executrix of George B. Ittmann is the only child of the deceased. As his relative and presumptive heir, she had sufficient legal interest to have protected his rights, if they were jeopardized by his mental condition during the time stated. Civ. Code, Arts. 390, 880. She took no steps in that direction until almost the last moment, nor did she take any steps leading to the protection of third parties, and, if loss results, it should rather fall on her than on creditors who dealt with her father in good faith, and in ignorance of the alleged existing situation. Id. Arts. 3029, 3034.

Equity and justice require that this should have been done. We are of the opinion that *quoad* the customers of the commercial firm of George B. Ittmann the partnership must be held to have continued to exist, certainly up to the date of the filing of the petition for interdiction, — a date which fixes plaintiff's dealings as having been made with the partnership, and binding upon both partners.

It is no more the duty of customers of a partnership whose duration is at the will of the partners, at their peril, to keep advised as to the mental condition of each of the members of the partnership, than it is for those of a partnership with a fixed period of life. They have the right to assume, until notified to the contrary by the parties in interest, that the partnership continues. Article 2876 of our Civil Code, under the heading of "The Different Manners in which Partnership Ends," assigns, among other causes: "(1) The expiration of the time for which such partnership was entered into. . . . (3) The death of one of the partners, or by his interdiction. . . . (5) The will of all the parties legally expressed, or by the will of any of them, founded on a legal cause, and expressed in the manner required by law." Article 2883 declares that the interdiction of one of the partners or his bankruptcy has, as to the dissolution of the partnership, the same effect as the death of one of the partners. Article 2884 is to the effect "That if the partnership has been contracted without any limitation of time one of the partners may dissolve the partnership by notifying to his partners that he does not intend to remain any longer in the partnership, provided, nevertheless, the renunciation to the partnership be made *bona fide*, and it does not take place unseasonably;" and Article 2888, "That there is just cause for a partner to dissolve the partnership before the appointed time, when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of his partnership which require his presence or his personal attendance."

Assuming the existence of a cause sufficient to have been invoked as a ground for ending the partnership, neither of the parties, nor others acting for them, availed themselves of it, or gave the notice required by Article 2884, or notice to customers of the firm. If the partnership be held to have continued, there was no necessity for the assent or consent of the different partners to the different partnership contracts. The partnership being distinct from the individuals who composed it, the consent of any one of the partners is the consent of the firm. Jacob Ittmann's capacity to contract being undoubted, his consent was sufficient to give validity to firm contracts, independently of the consent of George Ittmann. In Raymond *v.* Vaughn, 128 Ill. 256, the Supreme Court of Illinois held (even when one member was adjudged insane) that when his partner, without notice to third persons, continues to carry on the business as before, there is no dissolution of the partnership, and the managing partner must account to the insane partner for his share of the profits. If the succession of

George B. Ittmann be in a position *quoad* Jacob Ittmann to claim from him up to the date of the interdiction a share of the profits (and as we have said, there is nothing to show that it does not occupy such a position), it could scarcely expect to share benefits and escape responsibilities. In addition to what we have already said, we may say that there is nothing in the record which would lead us to believe that the plaintiff in this suit had any knowledge during the period covered by the transactions, declared on, of the alleged mental incapacity of George B. Ittmann. . . . We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

CHAPTER VIII.

ACCOUNTING AND DISTRIBUTION.

§ 1. Rules of Distribution.

GROTH et al. v. KERSTING et al.

23 Colo. 218: 47 Pac. 393. 1896.

Hayt, C. J. The defendants in error, Fritz Kersting and August Wilmsmeier, commenced suit against plaintiffs in error, Louis Groth and Ferdinand B. Becker. This action was numbered 13,115 in the District Court. The complaint in the suit, as originally instituted, contained two causes of action. The first, which was directed against the defendant Groth alone, is an action by two partners against the third member of the firm of Keating & Co. for an accounting. The second cause of action was against both of the defendants upon an account stated for brick bought. At the time of the institution of this suit, an attachment was issued in aid thereof, and sustained upon final hearing. To the original complaint a demurrer was interposed, and sustained. Thereafter the complaint was amended, and the first cause dropped therefrom. This first cause of action was subsequently made the basis of an independent suit, designated in the District Court as No. 13,900. After the issues were joined in the two causes, they were consolidated, and referred to I. E. Barnum, as referee, to take testimony, and report findings. As a result of the proceedings had before the referee, the plaintiffs in both cases were successful. Exceptions to the report were in due time filed, and overruled by the court. In accordance with the findings of the referee, the District Court rendered judgment for the plaintiffs for the sum of $8,751.54, against both defendants, and an individual judgment against Groth alone for the sum of $1,936.70. From this judgment a writ of error was sued out from the Court of Appeals, in which court the judgment of the District Court was in all things affirmed. See Groth v. Kersting, 4 Colo. App. 395. From this latter judgment the cause is brought here by error.

It is claimed that the referee's report, which formed the basis of the decree in the District Court, as well as that of the Court of Appeals, is manifestly erroneous, in that it fails to provide for the repayment to each partner of his contribution to the business. Undoubtedly, the usual order of distribution of the assets of a copartnership upon dissolution is as stated by counsel, to wit: (1) Payment of the debts or liabilities due third persons; (2) repaying to

each partner his advances; (3) repaying to each partner his capital; (4) division of the balance as profits. While this is the usual order, it may be altered by agreement of the parties, and in this case we think, from the evidence and the conditions under which the co-partnership was formed and the firm business transacted, the referee correctly determined that the amount contributed by the several partners was to be considered as assets of the firm, and to be distributed accordingly.

In accordance with the terms of the agreement, Kersting and Wilmsmeier were to devote their time and attention to the joint enterprise, and contribute only $3,650.50, while Groth was to contribute $8,000, although he had but a one-third interest in the business. This disproportionate amount was, we think, to be put in by Groth against the lease theretofore secured by Kersting & Co., and as an offset to their labor and services in the management of the business, with the further benefit to Groth resulting from an agreement to furnish brick for his building contracts at a lower price than they could be purchased for in the market. So, we conclude that it was not error for the referee to treat these several items as assets of the co-partnership, to be divided between the partners according to their interest in the co-partnership, without regard to the ratio of the original contributions.

Among the credits allowed Kersting & Co. is one for hauling brick. It is claimed that in this there is error because the brick were hauled by teams belonging to the co-partnership. We do not so understand the evidence. On the contrary, the referee gave credit only for the money paid to others for hauling. Mr. Kersting says: "Brick hauling, $1,242.40; that is, teams which hauled bricks, and we paid them for hauling." In the complaint it is alleged that the profits of the brick business were $9,731.68, for which the firm of Kersting & Co. is accountable, while the net profits of the business, as found by the referee, were only $7,828.60. It is urged that this is in violation of the rule binding parties by the allegations of their pleadings. This is not so, for the reason that this allegation of the complaint is denied by the answer, and evidence was taken upon the issue thus made. The referee found that the price charged for brick by Kersting & Co. was too high, and reduced the amount, thereby reducing the firm profits correspondingly. There was no error in this, but Kersting & Co. were improperly allowed, as part of the expenses of the business paid by them, the sum of $3,650.50, this being the value of the lease, horse, wagons, tools, brick, etc., contributed to the firm by Kersting and Wilmsmeier at the inception of the enterprise. The contribution to the firm, under the findings of the referee, became joint property or firm assets; and neither party should have been given credit for either of the amounts in the final settlement, except as the same may result from a division of the firm assets. The referee acted upon this rule so far as Groth is concerned,

but adopted a different rule as to Kersting and Wilmsmeier. This was not called to the attention of the court in any of the briefs filed or oral arguments heard prior to writing the first opinion, but was first mentioned in the petition for rehearing; but the error is manifest, and the correction will now be made. With this change the account may be stated as follows: —

Kersting & Wilmsmeier in Account with Kersting & Co.

To collections for firm	$68,805 64
By expenses paid for the firm	63,716 37
Balance due	$5,089 27
Firm Assets.	
Due from Groth & Becker for brick bought . . .	$8,751 54
Due from Kersting & Wilmsmeier, as above . . .	5,089 27
Due from Louis Groth for capital not contributed .	8,000 00
Total	$21,840 81
Of this amount Kersting & Wilmsmeier are entitled to two-thirds	$14,560 54
Less their indebtedness to the firm, as above . .	5,089 27
Balance due Kersting & Wilmsmeier	$9,471 27

Kersting and Wilmsmeier are entitled to judgment for the amount due them, viz., $9,471.27.

It is now conceded that Groth & Becker and Louis Groth may properly be considered as one and the same party so far as the settlement of this business is concerned. We will therefore not interfere with the judgment rendered against Groth & Becker for $8,751.54, but will correct the error by reducing the judgment against Groth from $1,936.70 to $719.73. The judgment of the Court of Appeals against Groth & Becker will therefore be affirmed, and the judgment against Groth reduced to $719.73; the costs in this court to be equally divided between the parties. The cause will be remanded to the Court of Appeals for further proceedings in accordance with this opinion.

Judgment modified.

LESERMAN *v.* BERNHEIMER ET AL.

113 N. Y. 39. 1889.

DANFORTH, J. The capital of the firm was $225,000, to which each partner contributed $75,000, under an agreement that each partner should share the profits and bear the losses equally with the others, viz., one-third each. No time was fixed for its continuance, and November 25, 1873, Leserman elected to have the business wound up,

and by notice to his partners required that an account should be taken for that purpose. This was done. An account of stock was taken and balance struck as of December 31 of that year, at which time the referee finds: "It was distinctly known and understood by all the parties that the partnership was to be dissolved and wound up in pursuance of the notice already given by Leserman." It was not, however, formally dissolved until March 13, 1874. (After setting out the agreement of dissolution by which Isaac Bernheimer was named as the liquidating partner, the learned judge proceeded:)

It was found that Leserman had drawn out of his original capital $10,499.97; that Bernheimer's had increased $56,621.39; while Goldsmith had drawn out the whole of his and also owed the firm $897.99. After paying all the liabilities of the firm, there remained, according to the report, $128,920 in the hands of the liquidating partner. This sum is carried to the capital account, and whether its disposition by the referee is correct, presents the first important inquiry. The interest of each partner in the partnership property is his share in the surplus after the partnership accounts are settled and all just claims satisfied. In this case, by the terms of the partnership, the partners were to contribute equally and divide the profits and share losses equally from the beginning of the partnership to its dissolution. There is no evidence which requires, or would permit, any finding that this arrangement had been changed, nor are we referred to such finding. It would seem to follow that the division of profits and charge of losses should be in the proportion of one-third of each to each partner. To carry out that mode of adjustment as the one provided by the agreement of the parties, the advances made by either partner beyond the capital called for by that agreement should be treated as a debt due from the firm and paid out of the surplus before any division is made upon the partnership capital.

If that advance was not in strictness to be regarded as a debt during the existence of the firm, nor until the debts of the firm to third persons were satisfied, it came into that relation the moment those debts were paid, and the concern, as regards its business and its outside obligations, wound up. This is an equitable disposition of the matter, for, otherwise, the larger the advance made for the firm the greater would be the share of losses, or, if profits, the greater the share of profits accruing to the partner making the advance, in either case a result entirely opposed to the actual agreement of the parties, which exacted equality in both respects. Nor is the rule opposed to the authorities cited by the respondent.

Story, in speaking of the rights of partners, says (348–348 a): "In taking the account between them upon an ordinary dissolution, each becomes chargeable with all the debts and claims which he owes to the partnership, and if any partner has made advances to the firm, and others have received advances from it, these do not constitute debts until the concern is wound up," and Richardson *v.* Bank of

England, 4 Myl. & Cr. 165, is to the same effect. That was a suit by the representatives of one partner, deceased, to have a general account taken of all the partnership dealings and transactions, and to have its affairs finally wound up and closed. The situation of the various partners as to advances and overdrafts was much like the relative position of the partners in the case before us. One of the defendant's co-partners had overdrawn, and upon motion that he be required to pay back the sum in question it was denied, upon the ground that until the accounts of the firm had been settled, and the joint debts paid, what may have been advanced by one partner or received by another can only constitute items in the account. From both authorities it is clear that, after the amount of profit and loss had been ascertained, the partner advancing might have his remedy, and the party who had overdrawn be subject to liability. Before dissolution and an accounting, the one who had advanced money could not compel payment by suit against the firm, for he was one of the firm and so one of the parties owing the money. After dissolution, and before account taken and payment of debts due to others, he could not enforce payment, for the dissolution worked no change in his position. But after these events happened, he became entitled to be paid the sum advanced before the moneys contributed to the firm were returned to the contributors.

Bernheimer was a contributor to capital: he was also in advance of that contribution, and the sum advanced must be repaid before the surplus can be ascertained; and from that surplus alone can there be a contribution; then to each partner equally; and if a loss is incurred, its ratio must be ascertained as originally agreed by the parties. The learned referee has not dealt with the appellant Bernheimer in accordance with these rules. He gives him one-third only of the surplus by reason of his original capital, and in accordance with the same theory the learned referee gives one other third of the surplus to Leserman, and the remaining third to Goldsmith. This method would be well enough if the surplus were sufficient to pay all. But it is not, and, moreover, the advance made by Bernheimer is left entirely unpaid. To cover it, therefore, the sum advanced is divided into three parts, and Bernheimer is given a judgment against Leserman for $18,873.72, or one-third; a judgment against Goldsmith for a like amount, or one-third, leaving him to bear a certain loss as to the remaining one-third, and imposing on him the risks of collection as against Goldsmith. We think this result is inequitable, and not required by any rule or principle of law.

The sum advanced by Bernheimer over his $75,000 should be first paid from the partnership surplus, and the residue divided among the partners according to the partnership agreement. Of course, Goldsmith, having drawn out his whole capital, could be entitled to no part of the surplus, and Leserman's share would be diminished by

reason of the sum already drawn by him. The losses entailed upon the firm by reason of Goldsmith's overdrafts of capital or otherwise, must, of course, be borne equally. . . .

Judgment reversed.

WRIGHT ET AL. *v.* CUDAHY.

48 N. E. (Ill.) 39. 1897.

CARTER, J. Wright and Catlin, his assignee in insolvency, appellants herein, filed their bill in equity in the Circuit Court of Cook County to dissolve an alleged partnership between Wright and John Cudahy, the appellee, and for an accounting. . . . Both parties agree, and the evidence shows, that to all outward appearances, and in their relations to third persons, there was on the 31st of May a dissolution of the partnership, and a transfer of the property purchased to Wright; and we are of the opinion that such apparent termination of the partnership relations of the parties should be treated as an actual dissolution as between themselves, unless it is made to appear by a preponderance of the evidence that, as alleged by Wright, he and Cudahy continued to be partners secretly throughout the deal. In other words, the burden of proof was upon Wright to prove that the termination of their business relations, which they both asserted to others and to the public, was not real, but only apparent; and, if he failed to make such proof, his bill is not sustained. . . .

We have carefully examined and considered the evidence, which is voluminous, but are unable to find that there is any preponderance in favor of the complainant in the bill. . . . Wright has failed to establish by a preponderance of the evidence that there was, by agreement between himself and Cudahy, a secret partnership after the understanding between them of the 31st of May, and the transfer of the purchases theretofore made, to him. So finding, we consider it unnecessary to extend the length of this opinion in reviewing the evidence in detail.

It is also insisted on the part of appellee that, if the evidence showed that the partnership did in fact continue until the failure, still the contract was a gambling contract under the statute, against public policy, and void. This defence was not set up in the answer, but does appear in the proof. Appellants insist, however, that the evidence upon this point was erroneously admitted, over their specific objection, and cannot be considered, on the ground that the allegations and proofs must correspond, and that proof without allegations in the pleadings is of no more avail than would be allegations without proof. It is also contended by appellants that the evidence does not bring the contract within the terms of the statute. We think it does.

Section 130 of the Criminal Code of this State provides: "Whoever . . . forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than $10, nor more than $1,000, or confined in the county jail, not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." The testimony of Cudahy, when called as a witness by the complainant, was that, when he (Wright) proposed that they go into the deal together, he said he could buy, probably, 150,000 or 160,000 barrels of pork, and get the market short, and make his own price for the balance over the pork actually in existence; that there were not above 75,000 barrels in the Chicago market. This was not denied by Wright, except as to the quantity in the Chicago market; but he claimed that by the deal they intended merely to take advantage of the favorable condition of the market; that there was a short corn crop the year before, and he counted on a short supply of hogs. The evidence tends to show that Wright and other members of the board of trade had reasonably accurate information as to the quantity of mess pork on the market in Chicago and other cities; and Wright himself testified that three-fourths of such pork was packed in Chicago. He knew that mess pork, to be what is called "regular," must be packed in a certain way, and between October 1st and the 1st of the following April, and that the market could not be stocked with new pork after their operations were commenced, soon after the middle of April, and before the deal would be closed. On this branch of the case, it is a strong circumstance tending to show that, whether Cudahy continued to be a partner with Wright or not, the scheme was to corner the market; that from 18,000 to 20,000 barrels of the pork purchased, and which was delivered through the Cudahy Packing House, was taken out of the barrels by the direction of Cudahy and Wright, at least with the knowledge and consent of both, and made "irregular," by sawing the pieces through the ribs, and repacking, thus so changing its condition that it could not be delivered on contracts made on board for "regular" mess pork, and reducing the amount of such pork on the market by the amount so changed. Wright testified that this was done so that the pork could not be shipped in again, resold, and delivered to them; that he did not want to be buying and selling the same pork over and over again. In his testimony he defined a "corner" to be "where somebody succeeds in buying for future delivery more property of a given kind than is possible for the seller to deliver before the day of the maturity of the contract." It is evident that that is precisely what he was attempting to do. By the attempt, the market price of pork was advanced; and, although the deal eventually proved unsuccessful, the attempt to corner the market, and the contract under which this attempt was made, were in direct conflict with the statute. Samuels v. Oliver, 130 Ill. 73.

It is insisted, however, that, as the illegality of the contract was not set up as a defence in the answer, the court could not consider the evidence on that branch of the case. The testimony adduced on the part of complainant himself tended strongly to show that the contract was illegal, but, even if it had not, it was not error for the court to inquire into the nature of the contract which it was asked to enforce, and, if it was found to be against public policy or one prohibited by public law, to refuse to aid either party, and leave them where they had placed themselves. The parties could not, whether by mistake or design, compel the court to adjudicate upon their alleged rights growing out of a contract void because against public policy or in violation of public law, by the simple process of narrowing their pleadings. The court itself had the right to know the nature of the contract it was called upon to enforce, and to deny all relief, where it appeared that such contract was in violation of law or the public policy of the State, whether so alleged in the pleadings or not. To hold otherwise would subordinate the courts to the ingenious devices of men engaged in illegal and even criminal transactions, and compel them to carry out in the solemn forms of law, and by its resistless power, transactions which the same law had pronounced criminal and void.

The citation of authorities ought not to be necessary to sustain the proposition that parties cannot compel a court of equity to enforce a contract appearing by the evidence to be illegal, by the simple device or inadvertence of omitting from the pleadings the charge of such illegality. In refusing to enforce such contracts, the court does not act for the benefit nor for the preservation of the alleged rights of either party, but in the maintenance of its own dignity, to the public good, and the laws of the State. Holman *v.* Johnson, Cowp. 343. It may well be that had the trial court, under the pleadings, refused to investigate the question as to the legality of the contract, and had found for the complainant, the defendant could not have alleged such refusal as error; but that question is not presented here.[1] . . .

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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§ 2. Repaying Advances.

FOLSOM *v.* MARLETTE.

49 Pac. (Nev.) 39. 1897.

Belknap, C. J. This is a suit for an accounting between partners, in which each demands a balance due from the other. The partnership was formed on the 29th day of September, 1880, and continued

[1] Cf. The Highwayman's Case, Everet *v.* Williams, 9 L. Q. Rev. 197.

until the 27th day of May, 1890, when it was dissolved. Its business was that of contracting for the cutting of cord wood and logs, and the sawing of timber, to which the business of merchandising was subsequently added. They were equal partners. The District Court ordered judgment in favor of respondent for the sum of $6,540.49. From the judgment and an order refusing a new trial, defendant has appealed. The assignment of errors will be considered *seriatim.*

1. Wells, Fargo, & Co. Account. Between February 24, 1885, and the month of October following, checks aggregating the sum of $1,300 were drawn upon and paid by the banking house of Wells, Fargo, & Co., of San Francisco, of which the books of the firm made no mention. Appellant contends that respondent is chargeable with this amount, upon the theory that he drew the checks. Conceding, for the purpose of the case, that respondent drew the checks, — although the District Court expressly failed to find the fact, — it does not follow that he is responsible to appellant for the amount. During the business season of each year, the firm employed a bookkeeper, whose duty it was to correctly keep the books and accounts. This person was not the servant of the respondent only, but of the firm, and any errors or mistakes made by him were not chargeable to one member of the firm only, unless under special circumstances, not existing here.

2. Herbert Account. In the month of August, 1889, respondent received the sum of $550 in part payment of an account against one Herbert. The amount was credited to the account, and cash debited on the journal and petty ledger. Appellant contends that respondent should be charged with the sum. The failure to properly charge these payments may be attributable to some innocent cause, as no suggestion of improper conduct has been hinted at. Respondent, as before said, cannot be charged with mistakes which may have been made in bookkeeping.

3. Valenzuela Account. The firm sold goods to Valenzuela, and sustained a loss of about $1,250 upon the account. It is claimed by appellant that Folsom agreed with Marlette that the goods should not be sold to the debtor without a guarantee of a third party for the payment of the account, and that afterwards the goods were sold without such guarantee, and a loss occurred in consequence. This contention is answered by the fact that the testimony is directly conflicting, and the district judge, by disallowing the claim, must impliedly have found in favor of respondent upon this point.

4. Respondent paid to the creditors of the firm, after it has discontinued business, a short time prior to its dissolution, the sum of $16,747.72. The District Court allowed interest upon this sum amounting to the sum of $7,224.06. The money thus paid is properly treated as an advancement for the benefit of the firm. Lindley, in his work upon Partnership, says: "An advance by a partner to a firm

is not treated as an incréase of his capital, but rather as a loan, on which interest ought to be paid; and, by usage, interest is payable on money *bona fide* advanced by one partner for partnership purposes, at least when the advance is made with the knowledge of the other partners." Volume 1, p. 390. The propriety of this charge admits of no question. The firm had no capital. It had been in the habit of paying interest at its banker's upon over-drafts for a long time. Appellant has not suggested in his testimony that this money was not advanced with his knowledge and acquiescence. Under these circumstances, the charge of interest is equitable. Baker *v.* Mayo, 129 Mass. 517; Morris *v.* Allen, 14 N. J. Eq. 44; Berry *v.* Folkes, 60 Miss. 576; Collender *v.* Phelan, 79 N. Y. 366.

5. On or about the 29th day of July, 1889, respondent, with consent of appellant, appropriated certain personal property belonging to the firm to his own use, charging himself therefor with the sum of $7,717.17 upon the books of the firm. There had been no agreement touching the valuation to be fixed on the property, and upon the trial, under the terms of a stipulation filed in the case by counsel, appellant objected to the price so fixed by respondent. This stipulation, among other things, provided "That a transcription of the firm books that had been introduced in evidence should be treated as a correct transcription, and as to all items and all balances appearing in said transcription, opposite to which is a red cross, such items and balances are disputed by defendant, S. H. Marlette." Accordingly, appellant, Marlette, did cause an "X" in red ink to be set opposite this item; thus indicating that he contested the valuation placed upon the property by the respondent, Folsom. Evidence was introduced touching the value of the property, and the fact was also shown that respondent had charged himself with $7,717.17 for it. Upon all of the testimony introduced, the court found as a fact that the value of the property was $5,000, and charged the respondent with that sum in the adjustment of the accounts. Appellant claims that respondent should be concluded by the value fixed by himself upon the books of the firm, and therefore respondent should have been charged with $2,717.17 more than the value fixed by the finding. It must be stated, as a matter of fact, that there was no objection to the introduction of testimony tending to establish a lower valuation than the charge made by the respondent. Appellant must have expected that the District Court would have placed a greater valuation than that with which the respondent had charged himself, otherwise there was no reason for the objection being taken. When the contest upon the charge was inaugurated by the appellant, under the peculiar circumstances of the case, the question of the value of the property was reopened, and respondent had the right to establish a lesser value, as the appellant to establish a greater value. He took the risk, and must abide the result. As the respondent has been allowed interest upon the advance he made for the benefit of the firm, it is only equitable

that the appellant should be allowed interest upon the value of this property, fixed at $5,000, from the date of its appropriation by respondent.

6. Wages. Appellant absented himself from the locality where the firm operated a considerable portion of the time. Respondent charged him for his services for a portion of the time. The first item of this nature was charged during the winter of 1882-83, and amounted to the sum of $300. No contention is made touching this charge. During the year 1885, $1,050 was charged. The court allowed this charge after having deducted the charge for wages during the month of July of that year. The general rule undoubtedly is that one partner is not entitled to charge the other compensation for his services without special agreement. There was no special agreement in this case, and the majority of the court are in favor of the enforcement of this rule. One member of the court, however, dissents from this view; holding that as these charges were made during the course of business, as the books were accessible to appellant, and a statement containing these charges was delivered to him upwards of two years prior to the dissolution of the firm, and no objection having been made then or afterwards until this proceeding was commenced, he should be deemed to have acquiesced in the charge. The charge will be stricken out. The case will be remanded to the District Court, with instructions to modify its judgment by disallowing respondent the $1,050 allowed as wages, and to allow him simple interest at the rate of 7 per cent per annum, instead of 10 per cent per annum, upon the advances made by him after they had ceased to do business together, and also allow appellant the same interest on the $5,000, the value of the property, from July 29, 1889.

Under the circumstances of the case, the costs in the District Court should not be allowed respondent; and that court will also correct its judgment by ordering each party to pay his own costs; the judgment, as corrected, to bear legal interest from date of original entry. The judgment thus modified and corrected is affirmed; each party to pay his own costs upon this appeal.

BONNIFIELD and MASSEY, JJ., concur.

MAGILTON v. STEVENSON ET AL.

173 Pa. St. 560: 34 At. 235. 1896.

BILL in equity for the dissolution of a partnership and an account. Among the conclusions of law in the master's report, which were excepted to by the defendants, was the following: "The master holds an account should be stated, and that, whereas, in accordance with the terms of the partnership agreement, Magilton 'shall in no event be put

to a loss of more than $1,250, and the balance shall be made up and paid to him in case of greater loss by the other partners,'

The amounts contributed by the plaintiff being .	$4,670.00
Amount advanced by him to the receiver . . .	100.00
Making a total of	$4,770.00
Deducting agreed maximum of loss	1,250.00
Leaves a balance of	$3,520.00

which should be paid by the defendants to the plaintiff; and that they should be held to be jointly and severally liable to the full payment of the same, together with the costs of the cause, including a suitable allowance for the services of the receiver."

J. G. Johnson and *De Forrest Ballou*, for appellants.

Joseph M. Pile, for appellee.

FELL, J. The first contention of the appellant is that the decree in this case should not have been entered, as the partnership affairs had not been settled and the plaintiff's loss ascertained. The partnership was formed for the single purpose of constructing waterworks in Mayfield, Ky. The only contribution of capital was that made by the plaintiff. The land on which the works were to have been constructed had been transferred, and the enterprise abandoned, and the business was a total failure. The receiver was unable to obtain a bid for the few articles of personal property found on the premises, and nothing of value came into his possession. The report of the learned master that the remaining property of the partnership was "practically worthless," as explained by the testimony and other parts of his report, is in effect a finding that they were worthless. There were no assets, no accounts to settle, and nothing remained but to adjust the equities between the parties.

The partnership agreement provides that: "The profits and losses are to be shared equally by the partners, each being entitled to one-fourth of the profits, and to be liable for one-fourth of the losses; provided, however, that the said Magilton shall in no event be put to a loss of more than $1,250, and the balance shall be made up, and paid to him in case of greater loss, by the other parties." The master held that the liability of the defendants to pay the loss of the plaintiff in excess of $1,250 was a joint and several liability. It is conceded that the finding of the master on this point would be correct if the parties stood in the relation of strangers; but it is contended that, in view of their partnership relation, the proviso, read in connection with the contract, imposes a liability on each of the remaining partners to bear only one-third of the plaintiff's loss in excess of $1,250. The plaintiff furnished the whole cash capital, and the twofold purpose of the proviso was to fix a limit beyond which his loss should not extend, and to secure the repayment by the other partners of the balance of his contribution to the common property. This was

done by providing that the balance should be paid to him by them. This is the plain meaning of the words used. In the preceding clause, there is a distinct limitation of individual liability for the general losses of the business; and the omission of this limitation from the proviso is significant, and indicates an intention that each should be liable for the whole in the event of the failure of the others to pay their shares. As the partnership had ended, and the defendants had refused, after demand, to adjust the accounts in accordance with the agreement, we see no error in the allowance of interest.

The decree is affirmed, at the cost of the appellant.

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§ 3. Repaying Capital.

WHITCOMB *v.* CONVERSE. et al.

119 Mass. 38. 1875.

Bill by plaintiff to compel contribution by his former co-partners to the losses incurred by the firm. By the partnership agreement, plaintiff was to contribute $50,000 of capital and to receive 25 per cent of the net profits. Converse was to contribute $25,000 and to receive 25 per cent of the net profits. Blagden and Stanton, the other partners, were to contribute their time, and each was to receive 25 per cent of the net profits. Upon the settlement of the affairs of the firm a loss of about $25,000 was disclosed.

C. T. Russell, for the plaintiff.

G. O. Shattuck and *O. W. Holmes, Jr.*, for defendant Stanton.

Gray, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. 3 Kent, Com. 28-29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story, Partn. 27, 29; Heran *v.* Hall, 1 B. Mon. 159.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership, to pay the value thereof

to the individuals who originally contributed it; such payment cannot, indeed, be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. Julis *v.* Ingalls, 1 Allen, 41; Bradbury *v.* Smith, 21 Maine, 117; Barfield *v.* Loughborough, L. R. 8 Ch. 1; *In re* Anglesea Colliery Co., L. R. 2 Eq. 379, 387; s. c. L. R. 1 Ch. 555; Nowell *v.* Nowell, L. R. 7 Eq. 538; *In re* Hodges Distillery Co., L. R. 6 Ch. 51, 56; 1 Lindl. Partn. (3d ed.) 696, 827, 828. Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed. The one in Everly *v.* Dueborow, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases. The other is Cameron *v.* Watson, 10 Rich. Eq. 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master, to whom the case was referred, allowed the case of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. pp. 88–90, 95, 96. The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give;" and Whitcomb and the other two partners, Blagden and Stanton, were each, "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of co-partnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership, and the partnership, consisting of all the

partners, became liable to Whitcomb and Converse, respectively, for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. Whitman *v.* Porter, 107 Mass. 522; 1 Lindl. Partn. 789, 790.

Decree for the plaintiff accordingly.

TAFT ET AL *v.* SCHWAMB.

80 Ill. 289. 1875.

SCHOLFIELD, J. The principal question to be determined in the case before us is, upon whom shall the loss, in consequence of the destruction of the building, machinery, engine, boiler, tools, etc., mentioned in the articles of co-partnership as delivered in as capital stock by Schwamb, fall? Upon Schwamb alone, or upon the parties in the proportion they are to share profit and loss? The latter was the conclusion of the court below; but appellants insist that the former is the basis upon which the account should have been stated. The articles stipulate:

"This co-partnership to commence on the twenty-eighth day of November, A. D. 1867, and to continue for the term of thirteen months and three days, ending on the thirty-first day of December, A. D. 1868; and to that end and purpose the said parties above named have each delivered in, as capital stock, as follows: Fred. Schwamb, the building known as No. 490 South Canal Street, and all machinery, including engine, boiler, tools, benches, lumber, all manufactured stock, and that under process of manufacture, now in his possession, supposed to be worth, say, $9,619.37, the same to be determined by an inventory. And the said J. W. Taft, and D. R. Crego, shall put in, as capital stock, the sum of $2,500, making a total capital stock of $12,119.37, to be used and employed in common between them for the support and management of the said business, to their mutual benefit and advantage. And it is further agreed between the parties to these presents that the said firm of Taft, Schwamb, & Crego shall pay interest, annually, to F. Schwamb on the sum of $7,119.37, or on what he may have in excess of said Taft and Crego's investment." . . . "And it is also agreed that they shall and will, at all times during said co-partnership, share, bear, pay, and discharge between them, each his share of all rents and other expenses that may be required for the support and management of the said business, and that all gains, profits, and increase that shall come, grow, or arise from or by means of their said business, shall, after paying the expenses as aforesaid, be divided between them, the said co-partners to receive their shares as follows: F. Schwamb to receive one-half of all gains or increase, or if the business has been at a loss, then F. Schwamb to pay one-half of all such losses; J. W. Taft to receive one-fourth of all gains or increase, or to stand one-fourth of all losses in all business transactions during said co-partnership; D. R. Crego to receive one-fourth of all gains or increase, or stand one-fourth of all losses in all business transactions during said co-partnership."

It would, in our opinion, be difficult to employ language more clearly indicating that the "building, machinery, tools," etc., etc., became the property of the co-partnership, and ceased to be the individual property of Schwamb than that employed in the articles. It was delivered in as "capital stock." What is "capital stock," in the sense in which the words are here used? Unmistakably, the capital or property of the co-partnership. The total capital stock represents everything of value belonging to the co-partnership, and it is therefore impossible that property delivered in as "capital stock" could be anything else than co-partnership property.

Being partnership property, the interest of each partner in it is to be determined by the extent of his interest in the partnership. It is said: "Each partner is possessed *per my et per tout* — that is, by the half or moiety, and by all, or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions, and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects, until a balance of accounts be struck between him and his co-partners, and it be ascertained precisely what is the actual amount of his interest." Gow on Partnership, 47; Story on Partnership, §§ 15, 16.

So, in Bopp *v.* Fox *et al.*, 63 Ill. 543, this court said: "It is a well-known rule, governing the relation of partnership, that partnership property must first be applied to the payment of partnership debts, and that the true and actual interest of each partner in the partnership stock is the balance found due to him after the payment of all the partnership debts and the adjustment of the partnership account between himself and his co-partners. And, in equity, real estate forms no exception, but stands on the same footing, in this respect, with personal property, no matter in whom the legal title may be vested."

It is undoubtedly true that the partners may, by contract, stipulate that the ownership of property may remain in one, while the partnership shall have only the use of the property, or make any other regulation, as between themselves, they may choose, in regard to the ownership of property used in connection with the business of the co-partnership, not prohibited by law; but the present case is unaffected by any such stipulation. The stipulation here, by making the property "delivered in" by Schwamb "capital stock," excludes the idea of a reserved ownership in him, and only a mere right to use the property by the co-partnership.

But, it is contended, there is a limitation in the clause relating to the sharing of profit and loss, which shows that it was intended Taft and Crego were only to share in the losses resulting from business transactions prosecuted subsequent to the payment of the capital stock, and disconnected entirely from losses of capital stock. This is based on the words, "losses in all business transactions during said co-partnership," which occur in the statement of the proportion of losses to be sustained by the respective parties in the event of loss.

We regard this as but another, although not precisely accurate mode of stating that losses in the partnership business shall be borne in the proportion there stated.

We have already seen that the property put in by Schwamb became partnership property, and the clause providing for the payment of interest by the firm to him on $7,119.37, or the excess in the amount paid in by him over that paid in by Taft and Crego, is a recognition that the firm was indebted to him in that amount. This shows, then, at the outset, the firm had a capital of $12,119.37, but was indebted $7,119.37, and the ownership was in the proportion of $2,500 in Schwamb to $2,500 in Taft and Crego jointly, or one-half in Schwamb and one-fourth each in Taft and Crego; from which it would result Schwamb should have one-half the profits and bear one-half the losses, and Taft and Crego each should have one-fourth the profits and bear one-fourth the losses, as is evidently intended by the clause under consideration. There is, in no view, in our opinion, anything in the clause negativing the idea that loss of capital should be borne in this proportion, and, in the absence of a contrary agreement, this is the equitable distribution of the burden.

Another clause in the articles of co-partnership is as follows:

> "And it is further agreed between the said parties, that, if, at the expiration of said co-partnership, said Taft and Crego shall wish to continue in said co-partnership, and become equal owners in the capital stock, they can do so upon a renewal of said co-partnership. The tools, fixtures, and machinery shall be put in at a discount of ten per cent from the present inventory price."

This expressly recognizes the right of Taft and Crego to become equal owners in the capital stock on the terms then provided for, and, by implication, that they were then owners, but not equal owners of the capital stock. There is nothing which can be said, even inferentially, to recognize an individual ownership in property used by the co-partnership, in Schwamb. The subsequent equal ownership may be, not of property then owned by Schwamb, but of the "capital stock."

On January 1, 1870, which was at the expiration of the term of co-partnership, as provided by the articles, the following was indorsed on the original articles and signed by the respective parties:

"By mutual consent, the above agreement will continue until January 1, 1871, with the exception of the interest of the partners, each partner's interest to be equal — that is, each one to have one-third of all profits, if any, and stand one-third of all losses in all business transactions during the continuance of this contract, the amount drawn out by each partner to be equal.

"J. W. Taft,
"Frederick Schwamb,
"D. R. Crego."

We think it clear that this was a continuation of the original copartnership as provided for in the clause quoted from the articles, and they thenceforth became equal owners in the capital stock. It is expressly provided that each partner's interest is to be equal. If each partner's interest is equal, then each has an equal interest in the capital stock, and, by consequence, should equally share in profit and loss, and the subsequent statement of the proportion of profit and loss to be shared cannot be presumed to have been intended as a limitation, other than as to the matters connected with the partnership, in contradistinction to losses that might be sustained outside of those matters. . . .

The objection that all the costs are decreed against appellants, when, since the object of the suit was to obtain a construction of the written instruments in which the parties were mutually interested, they should have been divided equally, we do not think well taken. Appellants, by an unauthorized construction of the written instruments, and by refusing to account on any other basis, necessitated the bringing of the suit, and the payment of the costs properly falls on them.

We are of opinion there is no error in the record, and the decree will therefore be affirmed. *Decree affirmed.*

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§ 4. Adjusting the Equities of Partners.

WARREN *v.* TAYLOR et al.

60 Ala. 218. 1877.

Bill by Warren against Taylor and Mrs. Benagh for a settlement of a partnership which had existed between the complainant and Taylor, for the foreclosure of a mortgage which said Taylor had given the complainant on his interest in the partnership effects, and for the adjustment of the conflicting liens of complainant's mortgage and Mrs. Benagh's.

The chancellor held that the complainant had no lien as a partner on account of the bill of exchange executed by Taylor & Warren referred to in the opinion, which complainant had paid, but must rely on his mortgage, and that Mrs. Benagh's mortgage was prior to his. He rendered a decree accordingly. Complainant appealed.

Somerville & McEachin and *S. A. M. Wood*, for appellant.

Hargrave & Lewis, *contra*.

STONE, J. Money was borrowed separately from two persons, each transaction having its inception about the same time, — January, 1874. The evidence of the indebtedness was in each case renewed from time to time, and mortgages given as security on the same property, — the borrower's interest in the "Times" newspaper and its property. In the case of Mrs. Benagh's loan, the first mortgage was executed directly to her, on the same date as the loan, January 8, 1874. This mortgage was renewed every three months. In the loan by Fitts & Co., bankers, the bill of Taylor & Warren, partners and joint-owners of the "Times" newspaper, was taken as security, due at a short interval. This debt was increased during the year, and was renewed every thirty days. A mortgage on Taylor's interest in the "Times" newspaper was given to Warren, to indemnify him against the use of the firm name, Taylor & Warren. This mortgage was also renewed at short intervals. At the request of Taylor, none of the mortgages were put on record, until March, 1875. Each series of mortgages was renewed within every three months; and this, it was believed, would preserve the lien from the date of the several mortgages given in renewal, without expense and notoriety of registration. In other words, it was believed that mortgages on personalty might be recorded within three months after their execution, and this would operate constructive notice to creditors and purchasers from their date. Each of the loans was for the personal use of Mr. Taylor, and no part of the money was applied to the purposes of the partnership of Taylor & Warren. Neither Mrs. Benagh, nor Mr. Warren, knew of the mortgage to the other, or that the other loan had been negotiated. On the 23d of March, 1875, Mr. Taylor being short in the payment of interest, promised quarterly, to Mrs. Benagh, she consulted counsel, and, on his advice, had her mortgage recorded on that day. Warren's mortgage was recorded four days afterwards. The question presented is, which has the paramount claim on the mortgaged property? Warren has paid up the bill to Fitts & Co. out of his private funds; and he is the actor in this suit.

1. In settling partnership accounts each partner is clothed with the right to insist that the partnership effects shall be first applied to the payment of the partnership debts; and this right will prevail over the claims of an alienee or creditor of the co-partner. So clearly defined is this right — so necessary to persons engaging in joint adventures of this kind — that it has been long and firmly settled that each partner has a lien on the effects, that they shall be applied primarily to the extinguishment of the partnership liabilities. This results, naturally and necessarily, from the nature of the enterprise, and of the title by which the property is held. The title is in the company, or association of individuals, and no one of the number has a separate ownership or right to any part or piece of the property or effects of the partnership. And the lien goes further than this. After the debts are all paid, each partner has a lien on the remaining partnership effects, for any balance

due him upon a proper accounting together. 1 Story's Eq. Jur. § 677; Moore *v.* Smith, 19 Ala. 774; Donelson *v.* Posey, 13 Ala. 752; Cannon *v.* Copeland, 43 Ala. 201; McGown *v.* Sprague, 23 Ala. 524; Reynolds *v.* Mardis, 17 Ala. 32; Reese *v.* Bradford, 13 Ala. 837; Lucas *v.* Atwood, 2 Stew. 378; Emanuel *v.* Bird, 19 Ala. 596; Bridge *v.* McCullough, 27 Ala. 661; Waldron *v.* Simmons, 28 Ala. 629; Andrews *v.* Kieth, 34 Ala. 722; Coster *v.* Bank of Georgia, 24 Ala. 37; Parsons on Partn. 265, 350, 351, 352, 168, 502; Bank *v.* Carrolton Railroad, 11 Wall. 624; Rodriguez *v.* Hefferman, 5 Johns. Ch. 417; Sitler *v.* Walker, 1 Freem. Ch. 77.

2. The disputed question in this case is, whether the claim of Warren is a partnership demand. There can be no question that it was a partnership debt, so long as it remained unpaid to Fitts & Co.; and they could have claimed and asserted all the rights against the partnership and its effects, which the law accords to partnership creditors. The bill was executed in the firm name, with the knowledge and consent of both partners; and this bound the firm. Even if the firm name had been signed by one, without authority from the other, the bill was made to be used, and was used in borrowing money; and there is no evidence that Fitts & Co. knew the use to which the money was to be applied. We are not prepared to say the debt would not have been a partnership liability, even if the bill had been executed as last supposed. Knapp *v.* McBride, 7 Ala. 19; Jemison *v.* Dearing, 41 Ala. 283; Cullum *v.* Bloodgood, 15 Ala. 34; 2 Brick. Dig. 306, § 103; Sprague *v.* Zunts, 18 Ala. 382.

The relation between partners is one of generous confidence. In the absence of special agreements to the contrary, the law constitutes each the agent of the other, and the representative of the firm in the conduct of all the ordinary business of the partnership. The act of one is the act of all. If it be a mercantile partnership, a sale by one is a sale by all. And a payment to one member of the firm discharges the debt, although that member may misapply or squander the money. It is not unfrequently the case, that one partner becomes more indebted to the firm than another. He may use more of the income and effects in his personal and private affairs, — may overdraw his share, or may anticipate future receipts and emoluments, sometimes with, and sometimes without his co-partner's knowledge or permission. In either case his share of the profits, or of the capital, if needed, will stand incumbered by a lien, to make good such deficit to his co-partner; and that lien will be paramount to the right of any alienee or creditor of his. "In general, when a sum of money is advanced to a partner, or a partner is permitted to take it as a loan, and there are no express terms agreed on, his profits are in the first place answerable; and if they are insufficient, his share of the stock goes to discharge this balance; and if that is insufficient, he becomes a personal debtor for the balance." Parsons on Partn. 241. See also 3 Kent's Com. 40 *et seq.*

If, instead of borrowing the firm's credit to raise money on, Mr.

Taylor had used its money, or had hypothecated its bills-receivable, and thus realized the sum of them on his private account, — and this either with or without Mr. Warren's consent, — the rule above declared would have applied in all its force, and Mr. Warren would have held a lien. So if there had been a partnership debt of Taylor & Warren, and Mr. Warren had paid it out of his private funds, this would have given him a claim and lien against Taylor's interest in either profits or capital of the partnership, paramount to the rights of creditors of, or purchasers from Taylor. And such creditor or purchaser would have no right to complain; for he would realize, by the transaction, all that Taylor could claim. He would be entitled to no more. In other words, Mrs. Benagh, in this suit, can claim what Taylor could claim, if he were suing Warren, no more. She purchased no other right. See Donelson *v.* Posey, and other authorities, *supra*. She cannot complain of this; for, purchasing a partner's interest in partnership effects, it was her duty to inquire of the other partner, how the account stood between them.

It will be seen that we have placed Warren's superior claim on the lien which the law gave him as a partner. Hence, it was not necessary for him to take a mortgage, or, taking it, to have it recorded. When he incurred the liability for Taylor, by allowing him to pledge the credit of the firm, he had no knowledge or notice of Mrs. Benagh's claim. We need not and do not decide, that his claim would prevail over Mrs. Benagh's, if, before the firm became bound to Fitts & Co., he had been notified of the conveyance to her.

We hold that, after taking a proper account between the partners, charging Taylor with the sum paid Fitts & Co. and interest, as so much paid to and for him by Warren, the business manager; and charging to each partner all proper debits, and allowing to each all proper credits, if a balance be found due to Warren, he has a first lien on the partnership effects, income, and capital, for its payment. This is his share in the partnership effects, and he is entitled to it, before Mrs. Benagh can take anything by her mortgage. Any balance to be equally divided between Warren and Taylor, the interest of the latter, as far as necessary, to be applied to the payment of Mrs. Benagh's mortgage, and interest thereon from January 1, 1876. Should the balance, on taking the account, be found in favor of Taylor, and against Warren, then such balance to be a first lien in favor of, and applied, as far as necessary, to the payment of Mrs. Benagh's mortgage debt, computed as above. Any balance of partnership effects to be equally divided between the partners; Taylor's share to go to Mrs. Benagh, so far as necessary to extinguish her mortgage claim. If anything be realized from the mortgage property in Greene County, the product to be applied to the payment of Warren's claim, if necessary, after exhausting the partnership effects. Should any of the partnership property and effects be used in paying a balance found due to Warren, and should any portion of Mrs. Benagh's claim remain unpaid; and should there remain a

surplus of proceeds of the Greene County mortgaged property, after paying Warren's claim, then, to the extent that Taylor's interest mortgaged to Mrs. Benagh is applied to Warren's claim, she, Mrs. Benagh, is subrogated to the mortgage rights of Warren in the surplus of the proceeds of the Greene County mortgaged property.

The decree of the Chancery Court is reversed, and a decree is here rendered, in accordance with the principles declared above. Costs of appeal to be paid by the appellees.

PENDLETON *v.* BEYER ET AL.

94 Wis. 31: 68 N. W. 415. 1896.

THE action is brought for the settlement of the accounts of a partnership which has already been dissolved. It is not stated whether there are any firm creditors. The plaintiff alleges that on settlement there will be found a large sum due him. He demands judgment for the recovery of such sum as may be found due him on such settlement. The answer denies that anything will be found due the plaintiff on settlement, and alleges that plaintiff is insolvent, and sets up by way of counterclaim several claims against the plaintiff, owned by the defendants severally; some relating more or less to the transactions of the partnership, and some growing out of matters entirely independent of the partnership transactions. The answer asks that these several claims be set off against whatever sum may be found due the plaintiff, and judgments in favor of the defendants severally for any balance in their favor. The plaintiff demurred to that part of the answer which sets up these alleged counterclaims, on the grounds that such counterclaims are not proper to be pleaded in such an action, and do not show a cause of action against the plaintiff. The demurrer was overruled, and the plaintiff appeals.

F. F. Wheeler and *Bouck & Hilton*, for appellant.

Greene, Vrooman, & Fairchild, for respondents.

NEWMAN, J. This case is anomalous. Strictly speaking, and in the ordinary sense of the word, the plaintiff has no claim to enforce against his co-partners, or either of them. If the defendants owe anything, they owe it to the partnership, and not to the plaintiff. If anything is due from them, it is due to the partnership, and not to the plaintiff. Sprout *v.* Crowley, 30 Wis. 187; Smith *v.* Diamond, 86 Wis. 359. Hence the plaintiff has, strictly, no claim against the defendants, or either of them. The credits of the firm are to be collected and applied to the payment of its debts, and the residue, if any, is to be distributed among the partners in proportion as they are entitled under the partnership agreement. This is usually done through the instrumentality of a receiver. Not until after the payment of firm debts and the

ascertainment of the residue can any claim arise in favor of any partner. The plaintiff, then, would not be entitled to a judgment against the defendants, or either of them, for his share is not due from them, but from the partnership fund. It is a fund in court, to be distributed under direction of the court. So, too, if a partner owes an individual debt to his co-partner, that in no way concerns the firm, and, under ordinary circumstances, a claim for such a credit can have no place in an action to dissolve a partnership and settle up its affairs. Smith *v.* Diamond, *supra*.

It is manifest that the claims against the plaintiff which the defendants propose to set off against this problematic claim of the plaintiff are not such claims as are authorized to be set off by either the statute of set-offs or counterclaims. Rev. St. §§ 2656, 4264. They are, at least, not claims "existing in favor of a defendant against a plaintiff between whom a several judgment may be had in the action." But, while set-off is altogether of statutory origin, equity had a well established jurisdiction and practice regulating set-offs before any statute on the subject was passed. In general, the right was limited to matters "connected with the subject of the action," and could only be founded upon matters relied upon in the complaint. The debts to be set off must have some connection with each other. But in case of mutual demands, and in cases where the debt due the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law or in equity to recover the same, a court of equity would compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed was held to be a sufficient ground for the exercise of this jurisdiction of the court of equity in allowing a set-off in cases not provided for by the statute. This court has recognized the existence of that jurisdiction. In Spear *v.* Day, 5 Wis. 193, the court say: "In a proper case a court of equity would undoubtedly, by virtue of its general jurisdiction, apply the doctrine of set-off, independently of the statute." Many times it has referred to the insolvency of the party against whom the set-off is claimed as being a sufficient ground for the exercise of that jurisdiction. Hiner *v.* Newton, 30 Wis. 640; Linderman *v.* Disbrow, 31 Wis. 465; Body *v.* Jewsen, 33 Wis. 402; Seligmann *v.* Heller, 69 Wis. 410; Jones *v.* Piening, 85 Wis. 264. The doctrine is held in many cases. A few will be mentioned. Gay *v.* Gay, 10 Paige, 369; Ives *v.* Miller, 19 Barb. 196; Cummings *v.* Morris, 25 N. Y. 625; 22 Am. & Eng. Enc. Law, 418–420, and cases cited.

This case seems to come within the spirit of this equitable doctrine. The plaintiff is insolvent. If, on the accounting and settlement of the partnership matters, anything shall be found due the plaintiff from the partnership, and it should be paid over to him, it would, apparently, be impossible for the defendants to obtain satisfaction of their claims against him. Actions at law upon these claims would be futile. So it seems that justice requires whatever sum may be found due to the

plaintiff shall be applied to the payment of these claims of the defendants. It matters little whether these claims shall be deemed technically counterclaims. They are deemed at least proper claims to be subtracted from such amount as shall be found due the plaintiff on such accounting, and it was proper at least that the plaintiff should be notified of the defendants' intention to ask to have them so applied.

Some of these proposed set-offs are against the plaintiff and another. Both are alleged to be insolvent. If these claims are several as well as joint, there is no valid reason why they also should not be applied in this way as set-offs.

The order of the Circuit Court is affirmed.

GYGER'S APPEAL.

62 Pa. St. 73. 1869.

Bill by retiring partners against Gyger for an account of the partnership assets, which passed into Gyger's hands, at the dissolution of the partnership, upon his undertaking to collect the assets and pay the balance to the retiring partners. The report of the master who was appointed to state the account, contained the following: "The defendant having refused to account, and denied his liability to do so, thus rendering necessary this suit and all the proceedings therein had, it is recommended that the costs of this as well as of the previous report of the master be imposed upon him." Defendant excepted to the report. The Court of Common Pleas of Lancaster County overruled the exceptions and defendant appealed.

O. J. Dickey and *J. E. Hiester*, for appellant.

R. W. Shenk and *D. G. Eshelman*, for appellees.

Sharswood, J. . . . The seventh error assigned is, that the court below erred in charging all the costs upon John Gyger. In equity, costs do not always follow a decree against a party. They rest on the sound descretion of the court, and are to be awarded or refused, according to the justice of each particular case. 3 Dan. Ch. Pr. 2. It has been decided that wherever an account is intricate or doubtful, there should be no costs, Pitt *v.* Page, 1 Bro. P. C. 1, and this is especially applicable to partnership accounts. Colly. on Partn. 339. In such cases the costs are usually divided, or, what is practically the same thing, are taxed on the partnership effects. Hutcheson *v.* Smith, 5 Irish Eq. 117; Jones *v.* Morhead, 3 B. Mon. 385; Taylor *v.* Crawthorne, 2 Dev. Eq. 221. There were conflicting claims in this case on both sides, and each party has been found as to some of them to be in the wrong. There were questions of real doubt and difficulty as to the amount of rent, and the apportionment of expenses as well as to interest and compensation. It is not easy to see how they could have been settled without a suit or a reference to mutual friends. We can-

not give so much weight as the master has done to the general denial by the defendant in his answer of liability to account. It was not that which rendered the suit unavoidable. The costs of this litigation appear, therefore, to be a necessary expense in consequence of the disputes between the parties in closing up the concerns of this co-partnership. It is an item in the account of profit and loss, which it would have been much better for all the partners to have saved by mutual concessions or otherwise, but which cannot in equity be charged upon one of them exclusively. Caldwell *v.* Zeiber, 7 Paige, 508. We are of the opinion that all the costs in the court below, as well as the costs of this appeal, should be paid out of the partnership money in the hands of the defendant, John Gyger, and that he should be allowed credit therefor in his account.[1]

ROSS *v.* WHITE.

[1894] 3 Chy. 326.

Lord Herschell, L. C. In this case, upon a dissolution of partnership, the accounts were taken under an order of the court. As the result of these accounts, it appears that there is a sum of £649 due from the defendant to the plaintiff, that being a sum of money advanced by the one partner to the partnership which, it is admitted, must be treated as a debt; about that there is no dispute. Then the finding is that each partner had originally contributed an equal sum, £1,750; each partner had drawn out some part of the capital which he had contributed, and the defendant had drawn out the sum of £601 in excess of the sum drawn out by the plaintiff.

The sole question which arises now is with reference to the payment of the costs of the plaintiff and defendant in taking these accounts. Mr. Renshaw contends for the principle that the payment of these costs ought to be made out of the assets after the discharge of any debts due, and before any distribution between the partners. It appears to me that the general proposition is well supported. But how is the matter to be dealt with in a case like the present, where the fund in court, after the plaintiff had received from it the £649 and the £600, is not sufficient to pay the costs? Mr. Renshaw contends that the costs ought to be paid out of the fund before the plaintiff is allowed to take from those assets the £601. I cannot think that this view is correct. The effect of the transaction is this, that out of the assets of the partnership the defendant has really received £601 in excess of what the plaintiff has received, and he claims that he shall take his costs out of the fund in court without making good to the assets of the

[1] Only so much of the statement and opinion as bear on the question of costs has been reprinted.

partnership that which he has taken out in excess of the sum taken out by the plaintiff. I think he cannot do so. Before he can claim to take his costs out of the assets, he would have to make good to the assets the sum which is found due from him. He has, in truth, in hand assets of the partnership, or what are to be considered as assets in adjusting the accounts between the plaintiff and defendant, and out of those, no doubt, he can pay the costs; but he cannot, retaining those assets, and without bringing himself as regards the assets of the partnership on an equality with his partner, claim to take his costs out of the assets which are in court for the purpose of answering the claims against the partnership.

For these reasons, I think the judgment appealed from is right, and that the appeal should be dismissed with costs.

LINDLEY, L. J. I am of the same opinion. I was struck yesterday with what Mr. Renshaw said about the way in which the costs ought to be paid. I thought he was right, and I still think he was right, provided the assets are as they ought to be. If his client will restore to the assets the sum in his hands, then his argument will be quite correct. The answer to his case is, that before he can take his costs out of the assets, he must make good what is due to the assets; otherwise obvious injustice will be done.

I think, therefore, that the judgment of the court below is right, and the appeal must be dismissed with costs.

DAVEY, L. J., delivered a concurring opinion.

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§ 5. THE GOOD-WILL OF THE FIRM BUSINESS.

WILLIAMS ET AL. v. FARRAND ET AL.

88 Mich. 473; 45 A. L. J. 392. 1891.

MCGRATH, J. Complainants and defendants had been for some years engaged as wholesale druggists on Larned Street east, in the city of Detroit, as co-partners, under the name and style of Farrand, Williams, & Co. There were no articles of co-partnership, and no term fixed for which the partnership was to continue. Prior to the taking of the annual inventory in January, 1890, defendant Jacob S. Farrand expressed to complainant Sheley a desire to dissolve the co-partnership. Mr. Sheley declined to say anything until the annual inventory should be taken, and the business of the year settled up. On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to "pay Messrs. Sheley & Brooks for their interest in the firm of Farrand, Williams, & Co., for the amount of their interest, being fifty thousand dollars ($50,000), the sum of sixty thousand dollars ($60,000), or they will take for their interest, the amount

being one hundred thousand dollars ($100,000), the sum of one hundred and twenty thousand dollars ($120,000), the sum to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next. The store to be leased to the party purchasing for a term of five years, at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing, at a net rental of six per cent a year on the cost of their interest therein."

On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the 1st day of February following a bill of sale was prepared, reciting, among other things, that defendants, in consideration of the sum of $120,000, paid to them by Alanson Sheley, party of the second part, "have bargained and sold unto the said party of the second part all our right, title, and interest in the within-mentioned resources of said firm, including the good-will attendant upon the business." This bill of sale was not executed, objection being made to the clause, "including the good-will attendant upon the business," and a new instrument was prepared, reciting that defendants, parties of the first part, "for and in consideration of the sum of one hundred and twenty thousand dollars, to them paid by Alanson Sheley, of the second part, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams, & Company." This instrument was executed, the insurance policies were assigned by Farrand, Williams, & Co. to Williams, Sheley, & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams, Sheley, & Brooks, and delivered to defendants. Defendants afterward formed a co-partnership under the firm name of Farrand, Williams, & Clark, and opened a wholesale drug establishment at No. 32 Woodward Avenue. Complainants adopted the name and style of Williams, Sheley, & Brooks, posted their firm name, as successors to Farrand, Williams, & Co., over their place of business; had the words "Williams, Sheley, & Brooks, Successors to" printed in red ink over the words "Farrand, Williams, & Co." wherever the latter appeared upon letter-heads, bill-heads, labels, and on other stationery; advertised themselves in the newspapers and trade journals as Williams, Sheley, & Brooks, successors to Farrand, Williams, & Co., and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the new firm. Defendants also extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good-will of the business, and having purchased the good-will of that business, they are entitled to the exclusive use of the old firm name; that while defendants have

the right to engage in the same line of business, they have not the right to such a collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employees. "Good-will" has been defined by this court to be "the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage." Chittenden *v.* Whitbeck, 50 Mich. 401. Lord Eldon, in Cruttwell *v.* Lye, 17 Ves. 335, defined it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good-will thereof, to his co-partner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed however to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person.

In Myers *v.* Buggy Co., 54 Mich. 215, A., B., and C. had been carrying on business as co-partners at Kalamazoo, under the name and style of "The Kalamazoo Wagon Company." A., B., and C. sold to complainant "all their interest in the property, money, assets, and good-will," etc., in and to their business. After such sale complainant's assignors formed a corporation under the name of "The Kalamazoo Buggy Company;" pitched their plant in the same locality; commenced the manufacture of the same class of goods; issued circulars to the trade, with descriptive cuts of the same character and appearance as those contained in complainant's circulars, and advertised their place of business as being in the same locality. In that case the name of "The Kalamazoo Wagon Company" was an assumed name. The only distinctive feature in the name adopted by defendant was the use of a word of similar meaning to that for which it had been substituted. The defendants were not using their own names. It was a pure case of piracy, and the facts clearly indicated an intention to deceive the public. As was said in Burgess *v.* Burgess, 3 De Gex, M. & G. 896: "Where a person is selling goods under a particular name, and another person,

not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by him as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that defendant is selling his goods as the goods of the plaintiff." In Lee *v.* Haley, L. R. 5 Ch. App. 155, plaintiff had been doing business at No. 22 Pall Mall, under the artificial name of "Guinea Coal Company." Defendant, who had been their manager, set up a rival business under the name of "Pall Mall Guinea Coal Company," at 45 Pall Mall. His envelopes and business cards were printed in such a way as to resemble the plaintiff's. In Glenny *v.* Smith, 2 Drew. & S. 476, defendant had been in plaintiff's employ, and started in business on his own account. Over his shop he had his own name, Frank P. Smith, printed in large, black letters on a white ground, but on the brass plates in the windows of his shop he had engraved the word "from" in small letters, and the words "Thrasher & Glenny" (the name of plaintiff's firm) in large letters. He had an awning also in front of his shop, which, when let down, would cover his own name, and expose only the name of the plaintiff's firm. The court held that defendant was deceiving the public, and an injunction was issued. Croft *v.* Day, 7 Beav. 84; Levy *v.* Walker, 10 Ch. Div. 438; Turton *v.* Turton, 42 Id. 128; Hookham *v.* Pottage, L. R. 8 Ch. App. 91; Meneely *v.* Meneely, 62 N. Y. 431; Fullwood *v.* Fullwood, 9 Ch. Div. 176.

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade name, or a trade-mark, the court will enjoin the continued violation of such agreement. In Grow *v.* Seligman, 47 Mich. 607, defendant had carried on the clothing business at Bay City, under the name and style of "Little Jake," and sold out to complainant, and expressly conveyed the right to use the name and style of "Little Jake," and agreed that he would not again engage in that business at Bay City, and defendant was enjoined from violating his agreement. In Shackle *v.* Baker, 14 Ves. 468, defendant agreed that he would not, for the space of ten years, carry on or permit any other person to carry on the same business in Middlesex, London, or Westminster, and that he would use his best endeavors to assist plaintiff and procure customers for him. In Hitchcock *v.* Coker, 6 Adol. & E. 438, Coker had agreed to enter the services of plaintiff, and that he would not at any time thereafter engage in the business in which his employer was engaged. To the same effect are Beal *v.* Chase, 31 Mich. 490; Doty *v.* Martin, 32 Id. 462; Burckhardt *v.* Burckhardt, 36 Ohio St. 261; Vernon *v.* Hallam, 34 Ch. Div. 752; Tode *v.* Gross, 28 N. E. Rep. (N. Y. App.) 469.

7. That an assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the busi-

ness or right of manufacture, and pass with it. Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words as detached from the thing to which they are applied, and that a conveyance of the thing to which it is attached carries with it the name. Dixon Co. *v.* Guggenheim, 2 Brewst. 321; Lockwood *v.* Bostwick, 2 Daly, 521; Derringer *v.* Plate, 29 Cal. 292. In Gage *v.* Publishing Co., 11 Ont. App. 402, Gage and Beatty were co-partners, and, among other things, were engaged in publishing "Beatty's Headline Copy-Books." Beatty sold out to Gage all his interest in the business, and engaged in the drug business. Gage continued for some years the sale of the copy-books, when Beatty licensed defendant to publish "Beatty's New and Improved Headline Copy-Books." In Hoxie *v.* Chaney, 143 Mass. 592, Hoxie and Chaney were co-partners, engaged in the manufacture of soaps, two brands of which were known as "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap." These were simply trade names by which the articles were known, and the right to use them passed with the right to manufacture the articles. In Cement Co. *v.* Le Page, 147 Mass. 206, Brooks and Le Page, as co-partners, sold to plaintiff the good-will of their business and the right to use their trade-marks. They were engaged in the manufacture of glues. Their light glues they named "Le Page's Liquid Glues." The court held that the right to use the name by which the articles were known to the trade passed with the right to manufacture the articles. In Merry *v.* Hooper, 111 N. Y. 415, the parties were formerly partners. Hooper sold to Merry, but afterward undertook to use, certain trade-marks, viz., the "Lion Brand" and "Phœnix Brand," but the court held that these trade-marks passed to the assignee. In Hall *v.* Barrows, 4 De Gex, J. & S. 150, the firm had marked the chief part of their output of iron with the initial letters of their partnership name, "B., B., & H.," surmounted by a crown, and the court held the letters and crown had become a trade-mark, and as such should be included as a subject of value. Brown, Trade-Marks, 358; Millington *v.* Fox, 3 Mylne & C. 338–352; Myers *v.* Buggy Co., 54 Mich. 215; Sohier *v.* Johnson, 111 Mass. 242; Shipwright *v.* Clements, 19 Wkly. Rep. 599; Rogers *v.* Taintor, 97 Mass. 291.

8. A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by the two companies. Holmes *v.* Manufacturing Co., 37 Conn. 278. These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good-will. Complainants insist however that a grant of good-will may be implied, and when express or implied, it imposes certain restraints upon the vendors, viz.: (1) That they cannot afterward personally solicit customers of the old firm, and (2) that they are restricted in the use that may be made of their own names.

I. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guarantee the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. Pars. Partn. *409. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality, — next door, if you please, — to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and unless expressly so agreed, there is no restraint upon that right. In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to again engage in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition

made to complainants was not only to sell, but to buy. In Ginesi *v.* Cooper, 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect. In Labouchere *v.* Dawson, L. R. 13 Eq. 322, the court say that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business, but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm. But in Pearson *v.* Pearson, 27 Ch. Div. 145, Labouchere *v.* Dawson is expressly overruled. The court say: "The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good-will. I think that there was, taking good-will as defined by Lord Eldon in Cruttwell *v.* Lye, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good-will, as defined by Lord Eldon. But the term 'good-will' is not used, and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of 'good-will.' It does not, *per se,* prevent the vendor from carrying on the same class of business." Vernon *v.* Hallam, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good-will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros. (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant. The court say: "When a vendor sells his business, and commences a similar business in the same locality, and solicits customers of the old house to deal with him, the court, following the decision in Pearson *v.* Pearson, and being of opinion that the case of Labouchere *v.* Dawson had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation." Leggott *v.* Barrett, 15 Ch. Div. 306; Ginesi *v.* Cooper, 14 Id. 596, and a number of other cases cited, follow Labouchere *v.* Dawson.

The correct rule is, we think, laid down in Cottrell *v.* Manufacturing Co., 54 Conn. 138. The court say: "Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacturing of printing-presses. By purchasing the good-will merely,

Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more he should have secured it by positive agreement. The matter of good-will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good-will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here, and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and by the potential instrumentalities of the newspapers and general circulars ask old customers to buy at the old place, and withhold from him only the instrumentality of highest power, viz., personal solicitation. To deny him the use of the newspapers and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these, and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade, either totally or partially, and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law." Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership name may become impersonal, after the death of the partners, and it is then treated like a fictitious or corporate name. A

surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive. It appears, however, that in the first bill of sale which was prepared the words, "including the good-will attendant upon such business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good-will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which complainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in Churton *v.* Douglas, Johns. Eng. Ch. 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business.

II. The next question relates to the use by defendants of the firm name of Farrand, Williams, & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A. B. should sell out his business to C. D., in the absence of a grant to C. D. of the right to use the name of A. B., or an agreement to the contrary, is there any doubt but that A. B. would have the right to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C. D., and if he desired to get the advantage of A. B.'s abstinence from business, he would insist upon an agreement to that effect. In the present case Mr. Farrand's name had been at the head of the firm name for nearly half a century, and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner

of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collection of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. In Lathrop *v.* Lathrop, 47 How. Pr. 532, after dissolution, J. Lathrop formed a co-partnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. Held, that in the absence of any covenant with his late partner, he might legally do so. In Reeves *v.* Denicke, 12 App. Pr. (N. S.) 92, the court say: "In this case the firm name was not sold or transferred to defendants as constituting a part of the partnership property, nor did the sale, in terms or by necessary implication, include the good-will, and it is, therefore, unnecessary to determine whether the partnership name was a part of such good-will. There was no restraint upon a retiring partner holding him from engaging in a similar business, and he violated no obligation by forming a new firm under his own name, and transacting a business in all respects like that he had released to them. It is quite clear that defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass and become a part of defendant's new firm, it should have been provided for in the conveyance. That it was not intended it should pass is evident from the omission to include it." Seed Co. *v.* Dorr, 70 Iowa, 481; Bassett *v.* Percival, 5 Allen, 345; McGowan *v.* McGowan, 22 Ohio St. 370. In Turton *v.* Turton, 42 Ch. Div. 128, although there were no contract relations between the parties, the court say: "No one can have the right to represent his goods as the goods of another; therefore if a man uses his own name, that is no *prima facie* case, but if he, besides using his own name, does other things which show that he is intending to represent, and is, in point of fact, making his goods represent, the goods of another, then he is so prohibited, but not otherwise." In Hookham *v.* Pottage, L. R. 8 Ch. App. 91, plaintiff and defendant had been co-partners as Hookham & Pottage. Plaintiff succeeded to the business, and defendant afterward set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court

held that "Defendant had a right to state that he was formerly manager, and afterward a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself by the statement of that fact of the reputation which he had so acquired, but that he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it." In Meneely *v.* Meneely, 62 N. Y. 431, the court say: "If defendants were using the name with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors of the old established foundry which was being conducted by plaintiffs, and thus enticing away customers, and if with that intention they used the name in such a way as to make it appear that of the plaintiffs' firm, or resorted to any artifice to induce the belief that defendants' establishment was the same as that of plaintiffs, and perhaps without actual fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishment, and produce injury beyond that which resulted from similarity in name, then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public. . . . Every man has the absolute right to his own name in his own business, even though he may thereby interfere with or injure the business of another, bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." In Fullwood *v.* Fullwood, 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset Place, Hexton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendant, Mathew Fullwood, and another brother formed a co-partnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co. (late of Somerset Place, Hexton), Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court say: "Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, provided they do not represent themselves to be carrying on the business which has descended to plaintiff." In Bininger *v.* Clark, 60 Barb. 113, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. Hegeman *v.* Hegeman, 8 Daly, 1; Levy *v.* Walker, 10 Ch. Div. 436. In Churton *v.* Douglas, Johns. Eng. Ch. 174; 5 Jur. (N. S.) 887, plaintiff and defendant had carried on the business as stuff manufacturers at Bradford in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas &

Co. Defendant sold out to plaintiff all his share, right, and title in the business, including the good-will, and executed to plaintiff a seven years' lease of the premises occupied by the firm. Within a short period defendant set up in the same line of business, next door to plaintiff, in a part of the same building, known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court says: "The authorities, I think, are conclusive upon this point, that the mere expression of parting with or selling the good-will does not imply a contract on the part of the person parting with that good-will not to set up again in the similar business; but I use the expression 'similar' to avoid including the case of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantage which he might acquire from his industry and labor, and from the regard people may have of him, and that in a place next door, if you like, to the very place where the former business was carried on. It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. Sykes *v.* Sykes, 3 Barn. & C. 541; Holloway *v.* Holloway, 13 Beav. 209; Rogers *v.* Taintor, 97 Mass. 291; Gilman *v.* Hunnewell, 122 Id. 139; Goodyear's India Rubber Glove Manuf. Co. *v.* Goodyear Rubber Co., 128 U. S. 598. The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employees, or newspaper reporters. In Meneely *v.* Meneely, the court say: "When the only confusion created is that which results from the similarity of names, the court will not interfere." In Turton *v.* Turton, it is said that "defendants are not responsible for the blunders made by the business community in not distinguishing between John Turton & Sons and Thomas Turton and Sons." See also Richardson & Boynton Co. *v.* Richardson & Morgan Co. (Sup.), 8 N. Y. Supp. 52; Goodyear's India Rub. Gl. Manuf. Co. *v.* Goodyear Rub. Co., 128 U. S. 598.

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for thirty years, and Williams, the son-in-law of Mr. Farrand,

for twenty-one years. Defendants are using their own names only. They went into business on Woodward Avenue, several blocks from the old stand. In every letter-head, bill-head, card, or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill-heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half of the amount of matter. It would be exceedingly difficult to prepare two bill-heads more unlike. The letter-heads of the old firm contained two cuts — one of the old stand, at the left hand, and one of the Peninsular White Lead and Color Works, on the right. The dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch in space. There has been no attempt at imitation in words or type. On March 15, they announced, through circulars distributed generally, that they had engaged in business at 32 and 34 Woodward Avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible. On April 7, they issued another circular, announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say: "Though it may seem paradoxical, it is nevertheless true, that the wholesale drug house of Farrand, Williams, & Clark is both the oldest and the newest representative of this important commercial industry in Detroit." But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm. It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors. Both parties advertised extensively in the city and State papers and in the trade journals, complainants giving the names of their individual members, and their new firm name, and advertising themselves as the successors to Farrand, Williams, & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had bought out the interests of defendants, the name adopted by complainants, the formation of the new firm, the names of its members, and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but through the State and Union. Nearly fifty letters

have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley, & Brooks; Farrand, Williams, & Sheley; Farrand, Williams, Sheley, & Co.; Farrand, Williams, & Brooks; Farrand & Co.; Williams, Farrand, & Co.; Farrand, Sheley, & Brooks; Williams & Farrand; Williams, Farrand, & Co., and Williams & Co. It cannot be said that any act of defendants is responsible for these blunders. Confusion is inseparable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of these who remain has appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name. It appears that at the outset defendant Clark by mistake opened two or three letters addressed "Farrand, Williams, & Co.," but in every other instance defendants refused to receive mail directed to Farrand, Williams, & Co., unless directed to defendants' street and number; that in a single instance Clark inadvertently signed a letter "Farrand, Williams, & Co.;" that two checks were sent to defendants in payment for goods bought from them, which were payable to the order of Farrand, Williams, & Co., and Mr. Farrand indorsed them Farrand, Williams, & Co., and guaranteed the indorsements; that in four instances merchandise or articles not marked, but intended for defendants, were delivered to complainants, and afterward taken away; that in two instances complainants were notified by freight agents that freight awaited delivery; that in both the goods were manifested to Farrand, Williams, & Co., but marked, and were afterward delivered, to Farrand, Williams, & Clark, for whom they were intended; that complainants were notified that a sample box of glassware had been shipped to them, but they had not received it; that defendants received a sample box of glassware from the same house, which was billed to Farrand, Williams, & Clark, and the latter were notified of the shipment by the assignors; that similar boxes of samples had been sent to other drug houses at Detroit; that in one or two instances merchandise had been delivered to defendants which was intended for complainants; that in a single instance a customer at Port Huron, who knew of the dissolution, intending to call up the old house by telephone, asked for Farrand & Williams, was given Farrand, Williams, & Clark, and told that it was Farrand, Williams, & Clark, asked the price of oil, and ordered one barrel; that one hundred and twelve letters, telegrams, receipts, or bills were received by complainants directed to Farrand, Williams, & Co., which were intended for defendants; that of these thirty-five were directed on the inside to Farrand, Williams, & Clark; that all of the letters so received were from business houses from which defendants were buying goods, and none were from customers of either house. These proofs do not tend to show any appropriation by defendants of the old

firm name, or any attempt to secure the correspondence addressed to the old firm, or that the customers have been deceived or misled, or that defendants have practised any fraud, concealment, or deception.

Complaint is made in the bill that defendants have enticed away certain of complainants' salesmen, but this charge is not made out by the proofs. It is also charged that defendants have simulated certain trade-marks and labels used by the old firm, but no instance of piracy has been established. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right to so imitate the labels in use by the old firm as to convey the belief that the goods labelled are from the old house. The use however of the words, "Sold by Farrand, Williams, & Co.," or "Prepared by Farrand, Williams, & Co.," upon a label, will not be protected as a trade-mark or trade name, and the right to use that name in that connection did not pass under the bill of sale.

The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed, with costs to defendants.

MORSE and GRANT, JJ., concurred with MCGRATH, J. LONG, J., did not sit. CHAMPLIN, C. J., dissented.

TREGO ET AL. v. HUNT.

[1896] Appeal Cases 7.

LORD MACNAGHTON. My Lords, the question for the House to determine is this: Is a person who has sold the good-will of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that the good-will shall belong solely to his partner, at liberty after the sale or the expiration of the partnership (as the case may be) to solicit the old customers of the business? There can be no difference in principle between the two cases. In 1872 Lord Romilly, M. R., decided the question in the negative in Labouchere *v.* Dawson, L. R. 13 Eq. 322. In 1884 the question was determined the other way by the Court of Appeal in Pearson *v.* Pearson, 27 Ch. D. 145, and Labouchere *v.* Dawson was overruled by Baggallay and Cotton, L. JJ., differing from Lindley, L. J., who thought Lord Romilly's decision right. In Labouchere *v.* Dawson the question arose out of a sale of good-will. In the present case there is a subsisting partnership between the appellants and the respondent in the business of varnish manufacturers. One of the terms of the partnership is that the good-will "shall be and remain the sole property" of the appellant, Anna Trego. The partnership will expire on January 1, 1896. The business is extremely lucrative, the connection very large. The respondent is, or was when this action was commenced, employing one of the clerks in copying

out the names and addresses of the customers with the avowed intention of soliciting their custom as soon as the partnership expires.

The object of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds, for this much, at least, is to be said in favor of the respondent, that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His defence was — "The law allows it."

After the observations of my noble and learned friend on the woolsack (Lord Herschell), I do not think it necessary to deal with the question at any length. The arguments on the one side and on the other are summed up in Labouchere *v.* Dawson and Pearson *v.* Pearson, and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which Sir George Jessel, M. R., held that a person who had sold the good-will of his business could not even deal with his former customers. There, I think, the Master of the Rolls went too far. The decision trenched on the rights of the public. On the other hand, the Master of the Rolls was clearly right in refusing to extend the principle of Labouchere *v.* Dawson to a sale in bankruptcy. There is all the difference in the world between the case of a man who sells what belongs to himself, and receives the consideration, and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

"A person not a lawyer," said Plumer, V. C., in Harrison *v.* Gardner, 2 Madd. at p. 219 in 1817, "would not imagine that when the good-will and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The good-will of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a good-will does not import restraint, and that a person selling the good-will of a business for however large a consideration is not prevented setting up the trade." In that case, as it happened, there were other circumstances indicating bad faith, and on that special ground the Vice Chancellor granted an injunction.

I agree, in substance, with the observations which I have quoted from the judgment in Harrison *v.* Gardner. What "good-will" means must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him, in Cruttwell *v.* Lye, 17 Ves. 335, 346, where he says: "The good-will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Often it happens that the

good-will is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the Vice Chancellor's phrase, would suppose that a man might sell the good-will of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities, which it is now too late to question, undoubtedly show that a man who has sold the good-will of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. Courts of equity could not of course enforce, even in a modified form and within reasonable limits, an agreement express or implied, which the law would have held void on the ground of public policy; nor could they treat the mere non-observance of such an agreement as fraudulent or inequitable. And so it has resulted that a person who sells the good-will of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may thus interfere with the custom of his neighbor, as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not, I think, to be excused by any maxim of public policy. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think that the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With Lindley, L. J., I am disposed to regret it. It is quite true that it would be better that the purchaser should protect himself by taking apt covenants from the person with whom he is dealing. But this, I think, is rather a counsel of perfection, than a reason for leaving the purchaser entirely at the mercy of the vendor.

The principle on which Labouchere *v.* Dawson rests has been presented in various ways. A man may not derogate from his own grant;

the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good-will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.

I am of opinion that the appellants are entitled to judgment.[1]

DYER *v.* SHOVE ET AL.

38 At. (R. I.) 498. 1897.

PER CURIAM. The testimony shows that, upon the death of Addison H. White, the surviving partners of the firm of A. H. White & Co. separated, and that the firm had a large list of customers in its business of insurance, which is the only thing of value alleged to have been the property of the firm. The claim here made is that Herbert M. Shove sold the good-will of the business, and the complainant, as surviving partner, asks an account. Upon the dissolution of the firm, both partners had the right to access to the books and to the list of customers of the old firm. Both had the right to compete for the continuance of their business with the old customers. The respondent Sweet, knowing that Shove had this connection with a large line of customers, paid him a sum of money to be admitted into partnership with him. It does not appear that anything more than this was done. No exclusive right to the old business was conveyed. The complainant could have made a similar arrangement without infringing any right of his former partner, Shove. One partner had as much right to use the name of the old firm as the other. There was therefore no sale of the good-will of the old firm, assuming that it existed, and hence no ground for the bill on that account. Rice *v.* Angell, 73 Tex. 355.

The bill is dismissed.

[1] LORD HERSCHELL and LORD DAVEY delivered concurring opinions. "Order of the Court of Appeal reversed, with a declaration that the appellants are entitled to an injunction restraining the respondent, his partners, servants, or agents, from applying privately, by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego, & Co., asking such customer to continue after the dissolution to deal with him, the respondent, or not to deal with the appellants."

CHAPTER IX.

LIMITED PARTNERSHIPS.

§ 1. Their Origen and Nature.

AMES v. DOWNING.

1 Brad. (N. Y. Surrogates Court) 321. 1850.

Surrogate Bradford. . . . The testator at the time of his decease was a special partner of Mr. Hicks, the executor, in business in this city; and the position has been taken by the counsel for the executor, that the firm was not dissolved, but, notwithstanding the testator's decease, continued until the expiration of the term limited for its duration. The idea at first impression is apt to win attention if not favor, but on closer scrutiny cannot, I think, be upheld. The legislation which brought into existence among us this form of partnership, had for its main object the encouragement of commerce by permitting the investment of capital in trade, without danger to the public, or risk to the special partner beyond the extent of the amount invested; and in determining the legal consequences incidental to the introduction of such an institution, there seems to me no reason for departing from the rules of the common law, any further than is fairly and naturally requisite to give full effect to the intent of the statute resting upon the presumption that the legislature having expressed the points in which the common law was intended to be abrogated, that line should not by judicial construction be extended, except by way of reasonable and necessary inference to effectuate the general objects of the statute. The special partnership is by no means a complete anomaly. By the statute it is termed a partnership, and both as to the rights of the parties to the contract, and as to the world, it is in itself a proper partnership, except as it limits the liability of the special partner, and restricts his control over the business of the firm. The members are partners, and by slight irregularities may easily be turned into general partners. The statute terms them partners; except for the statute they would be general partners, and from participating in the profits, it would seem to be a just consequence that they are partners in every sense, subject to liabilities and enjoying privileges as partners in every particular, except as otherwise specially provided. The common law regulates the mutual rights, and duties, and liabilities of partners, and governs these limited partnerships, in every respect not excepted out of the general rule by this statute. The 12th Section provides that every

alteration which shall be made in the names of the partners shall be deemed a dissolution of the partnership, and the necessary effect of an assignment by a special partner, of his interest in the firm, would be to alter the name of the special partner, and thus to work dissolution. Such would likewise seem to be the consequence of the death of the special partner, which effects an alteration in the name, by operation of law, through the medium of an administrator. The 18th Section declares also, that the general partners shall be liable to account to each other and to the special partners in law and equity as other partners now are by law; and the 24th Section provides, that no dissolution by the acts of the parties shall take place previous to the time specified for the duration of the partnership, without public notice. There appears to be nothing in the act incongruous with the idea, that the partnership is governed by the rules applicable to general partnership, except in the particular cases enumerated. There is nothing irreconcilable with the dissolution of the partnership by operation of law in the usual cases. I have looked into the statutes of several of the States, where similar laws have been enacted, and while they all imply that a dissolution may occur by operation of law, those of Massachusetts, Michigan, Rhode Island, and Virginia expressly admit of that mode of dissolution. The Code of Louisiana declares, that all partnerships shall terminate with the death of one of the partners, and quite a number of these acts prescribe that in cases not provided for the law relating to general partnerships shall govern. Rev. Stat. Mass. 306; La. Code, 2799, 2810, 2851; Rev. St. Me. 264; Laws Miss. 839; Rev. St. Mich. 156; R. S. N. J. 872; Laws Pa. 620; Laws R. I. 280; Va. Code, 583; Laws Conn. 528; Laws Ind. 429; Code of Ga. 373.

Now if any other principle is admitted, what is the result? If the death of the special partner does not cause a dissolution, shall that of the general partner have that effect? If the death of the special partner does not dissolve the firm, shall his executor or administrator be the partner? If so, does not that introduce a new name into the firm? And if it does, then the executor or administrator becomes a general partner, and if a general partner, then he can dissolve the firm (R. S. 3d ed. § 12, p. 50), or on the other hand, the estate he represents may be thrown into the hazards of a general partnership, and the executor or administrator have to attend personally to the transaction of a regular partnership business. The above statement of some of the embarrassing results which would flow from this novel proposition, should induce hesitation and caution in admitting it.

No doctrine is more universally established, than that by the death of any one of the partners the partnership is *ipso facto* dissolved; and this not only as to the deceased partner, but also as between all the survivors, and however numerous the association may be. The reasoning upon which this result is attained, as well as the rule itself, is amply illustrated by the civilians, the doctrine having its foundation in the

civil law, though it has been recognized and adopted, to its fullest extent, by the common law. The personal qualities, skill, character, and credit of each partner enter so thoroughly into every contract of this kind, that the law very wisely considers it a personal contract, expiring with death. Though these reasons are not so apposite to a special as to a general co-partnership, yet they are measurably applicable. It is true that a special partner has no control over the business of a firm, and contributes, as a matter of duty, no portion of his time, labor, or abilities towards the management of its affairs, but he may from time to time examine into the state and progress of the partnership concerns, and advise as to their management. This brings him into the most intimate relations with the general partner; and, in view of his right to give advice, it is evident the general partner may perhaps have built up well-founded hopes of a successful and thriving trade, upon the experience, wisdom, and abilities of his associate, expectations sure to be destroyed by death. How often is it the case that a successful merchant, retiring from the cares of active business, enters into a partnership of this kind, where his knowledke and sagacity, and his influence, are important inducements with the general partner to enter into the contract. Does a limited partnership survive the death of the special partner? Then it is compulsory on the survivor to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, a creditor or stranger taking administratives; and whatever may be the inconvenience and hardship of being thus thrown against his will, into connection with a stranger, or, perchance, with some one personally disagreeable, or hostile, the general partner must submit to the examination of the books, the visits, and the advice of the incomer. Gow on Partn. § 3, p. 220; Collyer, 3d Am. ed. p. 99. The joint stock companies, many of which exist in England, often comprise a large number of persons, and though generally managed by officers chosen at elections held by the stockholders, they are liable to the application of the same rules of law in regard to death and dissolution, as general partnerships, unless provision be made to meet the case, in the deed of settlement, or articles of agreement. Collyer, §§ 1112, 1113, 1115.

The system of limited partnerships, which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French Code. 3 Kent, 36; *Code de Commerce*, 19, 23, 24. Under the name of *la Société en commandite*, it has existed in France from the time of the middle ages; mention being made of it in the most authentic commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar latinity of the middle ages it was styled *commenda*, and in Italy *accommenda*. In the statutes of Pisa and Florence, it is recognized so far back as the year 1166; also in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles,

1253; of Geneva, of 1588. In the middle ages it was one of the most frequent combinations of trade, and was the basis of the active and widely extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even travelled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaped the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading class, and brought the Commons into position as an influential estate in the Commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract, of such ancient origin, but so recently introduced where the general partnership, known to the common law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be: "*Societas mercatorem qua uni sociorum tola negotiationis cura commendatur certis conditionibus.*" It was always considered a proper partnership, *societas*, with certain reserves and restrictions; and in the ordinance of Louis XIV., of 1673, it is ranked as a regular partnership. In the Code of Commerce it is classed in the same manner. I may add, as an important fact, for the explanation of a distinction to which I shall shortly advert, that the French Code permits a special partnership, of which the capital may be divided into shares, or stock, transmissible from hand to hand. In such a case, the death of the special partner does not dissolve the firm, the creation of transmissible shares being a proof that the association is formed *respectu negotii*, and not *respectu personarum;* but even in such a partnership the death of the general partner effects a dissolution, unless it is expressly stipulated otherwise. But, says M. Troplong, it would be wrong to extend the rule that a partnership, of which the capital is divided into transmissible shares, is not dissolved by the death of a shareholder, to a special partnership, the capital of which is not so divided. The statute of New York recognizes only the latter kind of partnership, the names of parties being required to be registered, and any change in the name working a dissolution, and turning the firm into a general partnership. Such a partnership has always been held to be dissolved by the death of the special partner. This partnership remains under the dominion of the common

law. It has created between the special and general partner a tie, which is not subjected to the caprice of unforeseen changes; it has produced mutual relations of confidence, which the general partner cannot be forced to extend to strangers. M. Troplong, Com. *du contrat de Société civile*, &c., T. 1, Preface, 57, § 377, &c.; T. 2, § 888, p. 368. The French jurists generally take the same position, defining the special partnership as a proper partnership, and applying the law of dissolution by death to all. Pothier, *Traité du contrat de Société*, ch. 2, § 2; ch. 8, § 3; Merlin, Répertoire, *de Jurisprudence*, Art. Société, § 7; Duranton, Droit Francais, tom. 17, 1, 3, Tit. 9, § 470. Pardessus discusses the question somewhat at length. Droit Commercial, tom. 4, Pt. 5, Tit. 3, ch. 1, § 4. It might be thought, he says, with some appearance of plausibility, that the rule of a dissolution by death should be limited to general partnerships, in forming which the probity and intelligence of each member have been reciprocally taken into consideration. Indeed, the special partnership does not suppose, on the part of the general partners any personal confidence in the special partners; and as the interests and the rights of the latter are exclusively limited to their shares, it would seem they were not modified by their decease, and their heirs, called to take their place, could have no right to insist that death had dissolved the firm, nor the general partners insist upon that result. These reasons, to question the general rule, appear, nevertheless, to yield to others more decisive. The persons and character of the special partners have been regarded by the general partners when they formed this kind of association. The special partners are, in effect, to a greater or less extent, called to annual accountings, to meetings for the settlement of the profits and losses, and to an examination of the state of affairs. This scrutiny, and a right to insist upon a dissolution in consequence of a breach of the contract, or to urge their claims when the affairs are liquidated, are more or less vigorously exercised. The difficulty of acting harmoniously with different persons, substituted in the place of those with whom the original contract was made, the distrust of heirs who have not the grounds of esteem and confidence which influenced the deceased, and the impossibility of treating easily with minors, are some of the reasons which will not permit special partnerships to be excepted from the general rule. It may be objected that these reasons apply only in favor of the general partners, and that it is for them to judge as to the continuation of business with the heirs. But the heirs of the deceased ought to enjoy the same privilege. Reciprocal right ought to result from a mutual agreement. There is no solid reason why the special partnership should not be dissolved by the death of one of the partners, except when the capital is divided into transmissible shares, in which case the associates having consented that each may substitute another in his place, as he may desire, without the authority of the others, it is natural to conclude that the heirs of a

deceased member fill his place in the same manner as if he had assigned his share. I have given the substance of the reasoning of Pardessus, and the result he attains has not only the authority of M. Troplong in its favor, but also that of other commentators — M. L. Malpeyre, et Jourdain, No. 474; M. Persil, *fils*, p. 344 — while it does not appear to have been questioned or doubted.

It thus appears, that in the jurisprudence of that nation whence the peculiar contract of special partnership has been adopted by us and grafted into our law, — where the system has long existed, is familiarly known, and its nature, qualities, and practical relations to various events and circumstances have been well considered under the light of no brief experience, — the effect of the death of the special partner is to dissolve the firm. This agrees with the conclusion I had attained upon independent reasoning, before consulting these authorities, and I am consequently led to pronounce the firm in which the testator was a special partner, dissolved at his death; and to hold the executor, who was his general partner, responsible for the testator's interest in the firm at that time, upon a liquidation of the affairs as if made then.

CLAPP *v.* LACEY ET AL.

35 Conn. 463. 1868.

PLAINTIFF, as executrix of the special partner in Lacey, Meecker, & Co., claimed payment from the general partners of $15,000, loaned by her testator to the firm. The defendants refused payment on the ground that the other debts of the firm are by law entitled to priority of payment, and that they are not by law liable to pay, and have no legal right to pay, the debt of the plaintiff until the other debts have been paid in full. The case was reserved for the advice of this court.

Loomis and *Beardsley*, for the plaintiff.

Treat and *A. P. Whitehead*, for the defendants.

BUTLER, J. We are all agreed that we must advise the Superior Court to determine the question which it is asked to decide in the negative. The case, as presented, does not find that the assets of the general partners are, in fact, insufficient to pay the debts of the partnership and that of Mrs. Clapp, and in the absence of such a finding no sufficient reason for withholding payment from Mrs. Clapp appears.

In regard to the construction which should be given to the statute in cases where insolvency, in fact, exists, we are not all agreed. A majority of the court are of opinion that the last clause of the 8th section of the statute has reference to the capital advanced by the special partner, and not to a loan like that which constitutes the debt in question.

Our statute in relation to limited partnerships, and that of New York, were both passed in the year 1822. Both were taken in substance from the law of France, and neither is a copy of the other; they differ in their arrangement and some of their provisions. The law of New York was copied in New Jersey and Pennsylvania, and perhaps some other States. In New York, New Jersey, and Pennsylvania, the provision in question constitutes a separate section, and is as follows: "In the case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the partnership shall be satisfied." In 1837, Chancellor Walworth, in the case of Mills *v.* Argall, 6 Paige, 577, held that section a bar to any claim for a debt by a special partner, until the claims of other creditors of the partnership were satisfied, and held an assignment preferring such a claim for that reason void. His opinion in that case assumes that to be the true construction of the statute, without entering into any examination of it, or assigning any reason for it. The Superior Court of New York, in the case of Hayes *v.* Bement, 3 Sandf. Sup. Ct. R. 394, and the Supreme Court in the case of Ward *v.* Newell, 42 Barb. 482, and the Court of Appeals in the case of White *v.* Hackett, 20 New York, 178, followed the decision of the chancellor, and the courts of Pennsylvania and Virginia have followed those of New York; but as our statute differs from the statutes of these States, the decisions taken together, although entitled to respect, and perhaps justified by their statutes, are not satisfactory as authority for the construction of our own. Such a construction of the statute, moreover, was, and is, inconsistent with the interests of the commercial community, and the legislature of New York in 1857 amended their statute in that particular, and enacted that a special partner may "loan money to and advance and pay money for the partnership, and may take and hold the notes, drafts, acceptances, and bonds of, or belonging to, the partnership as security for the repayment of such moneys and interest, and may use and lend his name and credit as security for the partnership in any business thereof, and shall have the same rights and remedies in these respects as any other creditor may have;" thus preventing the evils which were found to follow the construction given to the statute by their courts. The legislature of Massachusetts adopted a law authorizing limited partnerships in 1835, and, in view of the interests of the commercial community, wisely avoided the insertion of any section or clause like that of New York, simply providing that in case of insolvency the special partners should be held responsible for all the sums by them in any way received, withdrawn, or divided, so as to reduce the capital. And it seems probable that if we should follow the decisions which are urged upon our consideration, and give the same construction to our statute, we should go counter to the prevailing understanding of the profession and the community, and render

immediate corrective legislation necessary. Under such circumstances, we feel it to be our duty to give the statute an independent and careful examination and construction.

In doing this we must, in the first place, dissent from the rule of construction claimed by the counsel for the general partners to be applicable to the case. The statute, in our judgment, is not in derogation of the common law, because limited partnerships are unknown to that law, but an enabling, enlarging, and regulating statute, remedial in its character, and not therefore to be construed strictly as claimed. We discover nothing in its character, purpose, or provisions requiring any other than an ordinary and reasonable construction.

Looking, then, to the statute as a whole, and its history, in connection with the then condition of commercial law, we find a clear, general purpose and intent of the legislature to encourage trade by authorizing and permitting a capitalist to put his money into partnership with general partners possessed of skill and business character only, without becoming a general partner, or hazarding anything in the business except the capital originally subscribed. Such being the object and purpose for which the partnership was authorized, and the obvious general intent of the legislature, it seems to us to be in direct antagonism with that object and intent to make that capitalist a general partner as to any loans or advances other than the capital which he may make to the firm to assist them in their business, or save them from bankruptcy during a period of stringency or panic, when solvent houses are prostrated unless aided by their friends.

Looking again, and particularly at the provisions of the act, we find the same general intent particularly expressed in the second section, which contemplates, and says, that "The liability of the special partner shall extend no further than the funds or capital which he or they shall have furnished to the capital stock." But it is obvious that upon the construction claimed, the liability of the special partner will extend to and embrace all loans, advances, and other sums for which the partnership may in good faith, and for their best interests, in the course of their business, and independent of the capital stock, become indebted to him. Under that construction, he cannot rent a building to them in which to do their business without having his liability as general partner extend to the rent.

Such being the general intent of the legislature clearly deducible from the history, object, and purpose of the law, and the express language of the second section, and the construction claimed being antagonistic to it, we think it clear that it should not be adopted, unless necessarily and imperatively demanded by the language of the act; and we do not think such a construction is required. On the contrary, we think a different one, conforming to the obvious general intent of the law, is in harmony with the language of the section in question.

The 8th section is as follows: "All advancements to the capital stock by the special partners shall be made in cash payments, and no part of the capital furnished by such partners shall be withdrawn, either in the shape of dividends, profits, or otherwise, at any time within the period during which the partnership shall be continued; nor shall any special partner, under any circumstances, be considered as a creditor or allowed to claim as a creditor in case of the insolvency or bankruptcy of the partnership." Now it is to be observed that the particular language relied on, namely: "Nor shall any special partner, under any circumstances, be considered a creditor, or allowed to claim as a creditor in case of the insolvency or bankruptcy of the partnership," is part of a section, and of a single sentence too, which relates expressly to the capital stock of the special partner, and contemplates three things: viz., 1st, that the capital stock shall be furnished by the special partner in cash; 2d, that it shall not be withdrawn directly or indirectly during the continuance of the partnership; and 3d, that as to that capital the special partner shall never be considered as a creditor, or allowed to claim as a creditor. So much is unquestionable. The language does apply to the capital stock and prohibit the special partner from being considered as a creditor as to that in the contingency named. Does it necessarily import more? That is the point of the inquiry, and we think not. Moreover, those words, "be considered as a creditor," are not in the laws of any of the States whose decisions have been cited, and preceding the words "allowed to claim as a creditor," which obviously refers to the subject matter, are exceedingly significant of the intention of the legislature.

They are apt words to prohibit the consideration under any circumstances of the fund as a debt which is put in as capital, but are not apt or significant words except as they relate to something which is not a debt in fact, but which may be treated as such by the partners among themselves, and will be considered such on the winding up of the partnership, and say that it shall not be so considered under any circumstances till the debts are paid. A debt is a debt, and cannot be considered or treated as anything else; the special capital could be treated by the partners as a debt, if not prohibited; and thus read, a full and natural meaning is given the words, in harmony with the whole language of the section and sentence, and with the purpose and intent of all the other provisions of the law, and not inconsistent with either. It is not enough that the language is sufficiently comprehensive to reach business debts; for there is nothing else to show such an intent; and they do refer to the capital.

And why, it may be asked, if the legislature intended what is claimed, did they not by some one of fifty conceivable and brief forms say so? The law was evidently prepared with great care. It carries on its face a general intent, and if the legislature intended it should contain a particular inconsistent intent, is it not reasonable

to assume that they would have expressed that particular intent in apt and unmistakable words, and the law have contained some allusion to it as part of the intended object and purpose? And if that particular intent was not originally and sufficiently expressed, is it reasonable to suppose that it would have passed through two or three thorough revisions and been left thus ambiguous and inconsistent with itself? These questions carry their own answer with them.

Several reasons have been suggested which it is claimed may and should have influenced the legislature and justify the construction claimed. But in our judgment they do not prove the particular intent claimed. And there is nothing whatever which will justify us in holding that the legislature intended to legislate in respect to the business contracts of the special partner with the firm, except the fact that the language used in respect to the special capital, if wrested from its connections, is broad enough to embrace other indebtedness. If there was anything else to show that the words were intended to be used in their broadest sense, and nothing to show the contrary, we might feel at liberty to take a different view of it.

In view of all these considerations, we think it is our duty to construe the clause in question as relating to funds furnished by the special partner as capital stock, and not to independent debts contracted with him as an individual in good faith and in the course of their business; and so we advise the Superior Court.

In this opinion Hinman, C. J., and Carpenter, J., concurred. Park, J., dissented.

EDWARDS v. WARREN, &c. WORKS, LIMITED.

168 Mass. 564: 47 N. E. 502. 1897.

Lathrop, J. It is conceded by the plaintiff that as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee. The question, then, is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the State of Pennsylvania, is a partnership or a corporation. The trustee's answers to interrogatories refer to Brightly's Purd. Dig. (12th ed.) 1086–1088, and to the cases of Eliot v. Himrod, 108 Pa. St. 569, and Sheble v. Strong, 128 Pa. St. 315, as containing the law relative to the statement in the answer that the principal defendant was a partnership, and not a corporation. From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to

be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but, if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed 20 years.

Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and, when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association." In Eliot *v.* Himrod, 108 Pa. St. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership, which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member, and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." Sheble *v.* Strong, 128 Pa. St. 318, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one. At common law, a joint-stock company formed for business purposes is considered in this commonwealth merely as a partnership. Tappan *v.* Bailey, 4 Metc. (Mass.) 529; Tyrrell *v.* Washburn, 6 Allen, 466. The same rule has been applied to joint-stock associations formed under the laws of the State of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. Taft *v.* Ward, 106 Mass. 518; 111 Mass. 518; Bodwell *v.* Eastman, 106 Mass. 526; Gott *v.* Dinsmore, 111 Mass. 45, 51; Railroad *v.* Pearson, 128 Mass. 445. See also Frost *v.* Walker, 60 Me. 468; Dinsmore *v.* Railroad, 32 Leg. Int. 388; 11 Phila. 483. In Taft

v. Ward, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman: "These statutes provide, in substance, that any association consisting of seven or more shareholders or associates may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all co-partnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. Waterbury *v.* Express Co., 50 Barb. 157; Robbins *v.* Wells, 1 Rob. (N. Y.) 666. So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the State of New York; for each State adopts its own forms of remedy. Story, Confl. Laws, §§ 556–558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere co-partnership." There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. Phillips *v.* Blatchford, 137 Mass. 510. See also Hoadley *v.* County Com'rs, 105 Mass. 519; Gleason *v.* McKay, 134 Mass. 419.

The case mostly relied on by the plaintiff is Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, which was taken to the Supreme Court of the United States on a writ of error from this court. See Oliver *v.* Insurance Co., 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth, under St. 1862, c. 224, § 11, to restrain the defendant from prosecuting its business, until the tax assessed upon it by section 2 of the statute had been paid. This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or State, other than one of the United States," should annually pay a certain tax. The defendant was an English company, formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members, and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed, and subsequent statutes, declared that it should not be deemed to be incorporated. The company was composed in

part of British subjects, and in part of citizens of the State of New York. This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the Statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members." In the Supreme Court of the United States the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called "joint-stock companies," and that it could not sue or be sued in this country without legislative aid. This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the Supreme Court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the legislature has clearly recognized the distinction between foreign corporations and associations; and that, where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus, St. 1882, c. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here, upon whom process may be served, uses the language "every corporation, company, or association." St. 1887, c. 214, in section 1, provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company,' as used herein, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance." The language is the same in St. 1894, c. 522, § 1. By St. 1888, c. 429, § 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another State, and then doing business here, were allowed to continue business without incorporating under the act. But by St. 1892, c. 40, § 1, this was amended by striking out the words "associations or societies." St. 1884, c. 230, requires "every corporation established under the laws of any other State or foreign country," and hereafter having a usual place of business here before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served. St. 1888, c.

321, allows "manufacturing corporations established under the laws of other States," which have complied with the provisions of St. 1884, c. 330, to purchase and hold such real estate here as may be necessary for conducting their business. By St. 1895, c. 34, "foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes, or other choses in action" are made subject to the provisions of St. 1884, c. 330. St. 1896, c. 391, contains a provision relating to the personal liability, under certain circumstances, of the officers and members or stockholders in any corporation established under the laws of any other State or other country. See also St. 1895, c. 157. Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, the order discharging the trustee, and dismissing the action, must be affirmed.

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§ 2. Who May Compose Them.

THE CONTINENTAL NAT. BANK *v.* STRAUSS.

137 N. Y. 148. 1893.

Gray, J. This is an appeal of the plaintiff from a judgment of the Superior Court of New York city, dismissing its complaint, in an action brought upon a promissory note, as against the defendant Strauss. The complaint alleged that the firm of A. Hoexter & Company, an indorser upon the note, was composed of the defendant, Augustus Hoexter, Leo W. Hoexter, and Henry Strauss, as general partners. Strauss answered, denying the allegation, and alleged that A. Hoexter & Co. was a limited partnership, duly formed under the law, and in which he was the special partner. Upon the trial coming on, the plaintiff was at first disposed to rest its case against Strauss upon certain evidence given by a clerk, who had been employed by the firm, to the effect that he had frequently seen Strauss come into the store, converse with the Hoexters and look at the books, and that his name appeared on the sign as a partner. He did not know if there was any partnership agreement, and, upon being cross-examined, he said that Strauss' name was given as special partner on the sign, upon which the other names appeared as general partners. The trial judge holding that this proof only showed Strauss to be a special partner, the plaintiff was allowed to put in further proofs; which consisted in cer-

tain evidence of Strauss given in proceedings by him as the receiver of the firm against A. and L. Hoexter, and in the pleadings and proceedings in an action instituted by him against the firm to obtain a dissolution, an accounting and the sequestration of its assets through a receivership. From this evidence it was made to appear that the difficulties of the partnership arose out of the misconduct and malversations of Augustus Hoexter, which culminated, before the expiration of the term of the partnership, in the wasting or impairment of its assets, in its financial embarrassment, and, as the result of judgments against him which were sought to be enforced as against his partnership interest, in his making an assignment for the benefit of creditors and absconding immediately thereupon. It appeared from the evidence, also, that Strauss had paid in his contribution of $50,000 of special capital and nothing appeared to connect him, directly or inferentially, with the firm as a general partner. The trial judge dismissed the complaint, at the close of the plaintiff's case, as to Strauss; upon the ground that there was no evidence to make him liable as a general partner. We think he could not have ruled otherwise.

The plaintiff was bound, under the issue tendered, to establish affirmatively that Strauss was a general partner, if not as between him and the other partners, presumptively as to creditors of the firm, before it was entitled to recover. But in this it failed; and the extent of the proof was to show that he was a special partner. If plaintiff had given any evidence tending to show that Strauss' act had been such as to involve him with the management or conduct of the partnership affairs, or that the provisions of the limited partnership law had been violated in some way so as to make him liable as a general partner, the burden would then have been shifted to his shoulders, and he would have been obliged to repel the presumptions arising from such evidence, by other evidence. But it is not for Strauss, when the plaintiff's evidence simply exhibited him as a special partner of the firm, to show that the statute had been complied with in all respects, and that in none had there been such acts of commission or of omission, in violation of the statute, as to convert his liability into a general one as to firm creditors. The maxim *omnia praesumuntur rite esse acta* is applicable when the validity of the proceedings taken under a statute is in question, and the status of a party thereunder remains secure, until his assailant has rebutted the presumption by evidence showing, or tending to show, material violations or jurisdictional irregularities, through occurrence of which the statutory proceedings are invalidated and are no longer a defence. That question may be one of law for the court to decide, upon a construction of statutory provisions; or it may be one of fact, which as the fact may be decided by the jury, will determine the result to the parties interested. In the present case, as the evidence was not conflicting, it was for the court to say whether it tended to show that the statutory provisions had been violated by Strauss in such wise as to cast upon him the burden

of meeting and overcoming the plaintiff's proofs. Very correctly, the trial judge ruled that nothing militated against Strauss' position as a special partner. His allegation in that respect had been, so far, only borne out by the evidence, and every presumption was still in his favor.

We cannot agree with the learned counsel for the plaintiff that the fact of Leo Hoexter, one of the general partners, being a minor affected the question of Strauss' position and liability toward firm creditors. There can be no question but that an infant may become interested in business as a general partner. Nothing forbade it at common law and nothing in the statutory law now forbids it. His infancy was a factor in the situation, which enabled him to disaffirm his obligations and agreements, and, in that respect, the privilege was a personal one to himself. Infancy does not disable one from entering into contracts, and so long as the infant does not avail himself of the privilege to set up his infancy in bar of, or to avoid, an obligation, his position and his acts are as those of any responsible person. Any other view of his situation would lead to holding all his acts and engagements void; whereas they are voidable merely at his election. The Limited Partnership Act, in requiring that such partnerships may consist of one or more persons, who shall be called general partners, who shall be jointly and severally responsible as general partners now are by the law, has not given a definition of who may be general partners, which is at variance with what has been said. If the general partner, or one of the general partners, is a minor, he, nevertheless, is responsible for all partnership engagements and will be, unless and until he elects to set up the personal plea of infancy. But that he will do so is not to be presumed. To the contrary is the presumption. It would be an immoral presumption to entertain that a person who enters into engagements with others will resort to the plea of infancy to avoid them thereafter. The law has, with a great solicitude for the interests of infants, thrown about them a protecting arm, and accords to them the privilege to plead their incapacity, if they desire to escape from compliance with, or the results of, some contract. It does not and cannot, perhaps unfortunately, make a distinction in favor of those who honestly seek to be relieved of some advantage taken of them in their minority, as against those who use the plea of infancy to take an advantage of others. The law does not compel them to set up the plea; any more than it stamps their engagements as void. There is not the slightest pretence, of course, here that Leo Hoexter ever did, or intended to, avail himself of this plea. The fact of his being a minor merely appeared in evidence, and is availed of for the argument. We hold that he might be a general partner, and that nothing in the limited partnership law was intended to encourage the employment of capital in trade by limiting the liability of the intending contributor to the capital invested, upon his compliance with the provisions of that law. While securing to the business community such an obvious advantage, it secures to them, in

their dealings with the partnership, the fullest knowledge about its formation, duly and in good faith, and requires in such respect the utmost exactness and good faith, and the abstention of the special partner from any interference with, or taking part in, the conduct of the business.

But the appellant further argues that there was an interference by Strauss with the business of A. Hoexter & Co., which was in violation of the command of the act, and which fastened upon him the liabitity of a general partner, in that he brought the action for the dissolution of the partnership before the expiration of the term fixed in its articles, and became its receiver. What the act inhibits is a dissolution by the act of the parties previous to the time specified in the articles. It would be too great a strain upon the reason, in my judgment, to say that the proceedings in question were within the contemplation and the provision of the law. One of its sections, 18, especially provides that general partners shall be liable to account to each other and to the special partner for their management of the concern, both in law and equity, as other partners now are by law. This appeared to be a very plain case for the prompt intervention of a court of equity and for the sequestration of the firm assets in the hands of its receiver, upon facts showing the condition of embarrassment in the affairs of the firm, which Augustus Hoexter had brought about by his misconduct. The action was in the interest of the creditors, as well as of the partners, and the receiver, as an officer of the court, represented them both. Strauss had a right to take this step to compel an accounting, and, meanwhile, by a receivership to hold and to get in what assets there might be of this firm, which had been so badly wrecked by the fraudulent acts of the absconding member.

His own appointment as the receiver was a matter or question of propriety which concerned the creditors at the time, and it was not a matter which in any way affected or changed his legal relations as a partner under the articles of the partnership. The law does intend that a limited partnership shall continue for the term specified, and that the parties shall not terminate it sooner by their agreement, while a going concern. It was not the intention to deprive the members of those equitable rights which might accrue to them as against their associates by reason of fraudulent acts, the result of which is, in fact, to terminate or to cause a stoppage of its business. In such a case as this, the special partner's action is not hostile to the creditors, but, presumably, to their advantage.

These and other questions have been very fully and satisfactorily discussed at the General Term below, and there is no necessity to add to the discussion further than we have done.

The judgment should be affirmed with costs.[1]

[1] By § 30, ch. 420, N. Y. Laws, 1897, only persons of full age can be members of a limited partnership.

BENARD, &c. CO. *v.* PACKARD & CALVIN, LIMITED.

64 Fed. 309. 1894.

DALLAS, CIRCUIT JUDGE. The bill of exceptions set forth that:

> "Upon the trial the evidence on the part of the plaintiff showed, as the basis of his suit, a written contract for the construction of a mill, at a cost exceeding five hundred dollars, made by plaintiff with 'Packard & Calvin, Ltd.;' a company claiming to have been organized under the Limited Partnership Act of Pennsylvania, approved June 2, 1874, and its supplements. The plaintiff's evidence further showed that M. L. Packard was the wife of W. R. Packard, and that Tabitha L. Calvin was the wife of William J. Calvin, and that these four persons, who are the defendants in this case, were the only members or stockholders of the said alleged limited partnership, and that they had complied with all the requirements of the said act of 1874 and its supplements, if they, as two husbands and their respective wives, were competent, under said act and its supplements, to organize and constitute a limited partnership association. It further appeared by the plaintiff's evidence that the contract in suit was signed, 'Packard & Calvin, Ltd.,' by only one manager of said alleged limited partnership. The plaintiff, having shown these facts, rested his case; and the court, upon motion of defendant's attorney, entered a compulsory nonsuit, which the court afterwards refused to take off."

The question which was raised in the Circuit Court, and which is now presented here, is whether the four persons who had associated themselves together as stated in the foregoing extract are liable, as general partners upon the contract sued on, notwithstanding the fact that it was "made by plaintiff with Packard & Calvin, Ltd." The action was brought to enforce such supposed general liability, and the plaintiff contends that, to that end, it should have been sustained. This contention is put upon several grounds, which will be separately disposed of, but without extended discussion.

1. The Pennsylvania statute of June 2, 1874, which requires not less than three persons to unite to form a limited partnership, is complied with where, as in this instance, two of the persons uniting are married women, and the others are their respective husbands. This understanding of the law seems to be supported by the opinion of the Supreme Court of Pennsylvania delivered in the case of Steffen *v.* Smith, 159 Pa. St. 207, 28 Atl. 295; and, apart from this, we have no doubt of its correctness. . . .

3. The proposition that, because the contract was signed "by only one manager of said alleged limited partnership," all the members thereof became generally liable, is untenable. It is founded on the provision of the Pennsylvania statute (section 5) that "no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers." But it is quite plain that the act of a single manager, in disregard of this provision, cannot have the effect of extending the liability of the other members of the association

It was intended for their benefit, and should not be construed to their disadvantage. The person so incurring a liability is himself bound, but, as this results from an express exception, applied to him only, it follows that the legislature could not have intended that his co-members would be similarly bound.

The judgment is affirmed, with costs.

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§ 3. REQUISITES TO THEIR FORMATION.

BUCK ET AL. v. ALLEY ET AL.

145 N. Y. 488: 40 N. E. 236. 1895.

ANDREWS, C. J. The claim that section 13 of the Limited Partnership Act (1 Rev. St. 765), as amended by chapter 661 of the Laws of 1866, permits the use by a limited partnership of the words "and Company," or "& Co.," as a part of the firm name, to represent the special partner, cannot be supported. The section, so far as now material, is as follows: "The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, except that where there are two or more general partners the firm name may consist of either one or more of such general partners, with or without the addition of the words 'and Company,' or '& Co.,' and if the name of any special partner shall be used in such firm with his privity, he shall be deemed a general partner; but the said partnership shall put upon some conspicuous place on the outside and in front of the building some sign on which shall be printed in legible English characters all the names in full of all the members of said partnership," etc. By the natural reading of the section, the use of the words "and Company," or "& Co.," are only permitted where there are two or more general partners, in which case the firm name may consist of the names of one or more of the general partners and of the addition "and Company," or "& Co.," to represent the general partners whose names are not expressed. The section makes a special partner liable as a general partner, if his name is used in the firm title with his privity. It is difficult to suppose that the legislature, while interdicting the use of his name, except at this hazard, intended at the same time to permit the use of an addition to represent him. The history of section 13 strongly corroborates this view. It discloses a consistent purpose in the legislature from the beginning to prevent the name or the existence of a special partner to be indicated in the firm name. The original policy was doubtless to prevent credit being given to a person not liable as a general partner for the debts or liabilities of the firm, though this policy has been greatly modified and to a great degree subverted by recent legislation. The original section passed in

1822 (chapter 244, § 4) required that the business of a limited partnership should be conducted "under a name or firm name consisting of the names of all the partners interested, excepting special partners, whose names shall not be used under the penalty of being liable as general partners." Section 13 of the Limited Partnership Act in the Revised Statutes relating to the same subject, and which superseded section 4 in the Act of 1822, omitted the requirement that the names of all the general partners should be inserted in the firm name, and in place of that requirement prescribed that the business should be "conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word 'Company' or any other general term." This was the first enactment referring to the use of the addition "Company" in the name of limited partnerships, and such use was prohibited. Under this section the firm name might be that of one or more of the general partners, but it could not be supplemented by the word "Company" or any other general term. The firm name might comprise the names of all the general partners or a part of them only, but, if part only were named, the suggestion that there were others could not be made through the vague designation of "Company" or the use of a similar general word. The amendment of section 13 by chapter 476 of the Laws of 1862 modified the provision prohibiting the use of an addition contained in the original section, and declared that where there are more than two general partners the firm name may consist of either two of such partners, with the addition of the words "and Company," and made provision for the first time requiring that a sign should be placed on the building occupied by the partnership containing the names of all the partners. The amendment of 1862 was designed to relieve the general partners, where there were more than two (all of whom might desire to be represented in the firm name), from the inconvenience of having all the names inserted in the title, and permit the addition "and Company" to be added to represent them. The amendment in no respect modified the position of a special partner. The amendment was not intended to give him representation in the firm name. His position was unchanged, and the provision remained as originally enacted, that "if the name of the special partner shall be used in such firm name, with his privity, he shall be deemed a general partner." There was obvious propriety in permitting general partners to be represented by the addition "and Company," but none in view of the policy of the legislature to extend this privilege to special partners. Section 13 was again amended by chapter 43 of the Laws of 1864 by removing the restriction in the amendment of 1862 of the use of the addition to the case where there were more than two general partners, and allowing it to be used "where there are two or more;" and the section was again amended by chapter 661 of the Laws of 1866, which did not change the section in any respect relevant to the present case from what it was under the amendment of 1862. This review of the course of legislation seems to show beyond reason-

able doubt that the legislature, from the time of the Act of 1822 through all the changes in the law on the subject of the firm name, have maintained the principle that the firm name of a limited partnership should represent only general partners, and that the modifications intended by the amendments in the subsequent revisions of section 13 were designed to remove the stringency of the original enactment, so that general partners might be represented in the firm name either by specification or by inclusion under the addition "and Company." This interpretation of the statute leads to the conclusion that the use of the firm name of W. S. Alley & Co., in the business in which the defendant William S. Alley was the sole general partner, and the defendants Ferdinand T. Hopkins and Thomas H. Thomas were special partners only, was unauthorized, and in violation of the implied prohibition of section 13 of the Limited Partnership Act.

The remaining question is whether its use in this case, made, as the certificate shows, with the privity of the special partners, rendered them liable as general partners for the debts of the firm. In Ward *v.* Newell, 42 Barb. 482, the question was presented and considered by Clerke, J., who delivered the prevailing opinion in that case, and who "was inclined" to the opinion that such a firm designation rendered the special partners liable as general partners, but the judgment proceeded on another ground. In no case in this State, so far as we can ascertain, has it been so adjudged prior to the decision in the present case. The question depends upon the construction of the statute; and in construing a statute all its provisions may be considered, to arrive at the intention of the legislature. The remark of Cowen, J., in Bowen *v.* Argall, 24 Wend. 501, that "No doubt the provision of 1 Rev. St. 763, prescribing the manner of instituting limited partnerships, must be substantially complied with, or the creditors may treat the members of the firm as general partners," may be admitted as stating a true general principle applicable to the construction of the Limited Partnership Act. But he held in that case that it is not every departure from the provisions of the act which would subject a special partner to a general liability. There a general partner had made a general assignment for the benefit of creditors, which provided for the payment of a debt due to a special partner ratably with the other creditors of the firm, which was held by the chancellor in Mills *v.* Argall, 6 Paige, 577, to be a violation of the twenty-third section of the Limited Partnership Act, and Judge Cowen, in his opinion, assuming the correctness of the decision of the chancellor, said: "I see nothing in the act declaring, as a consequence of an assignment or other act providing for the forbidden preference, that the special partner should thereby become liable as a general one. The only consequence of the construction contended for by the plaintiff in error would be the avoiding of the partnership provision for the benefit of other partnership creditors."

Coming to a particular consideration of the question now presented, and looking at the Limited Partnership Act, the first thing which strikes

the attention is that section 13 contains only an implied prohibition of the use of the addition "and Company," or "& Co.," to designate a special partner, and does not declare any consequence of such unauthorized addition, but that the section does affirmatively declare that when the name of the special partner shall be used in the firm name with his privity "he shall be deemed a general partner." It affixes the penalty to the use of the name only. This is not the only instance where the penalty of liability as a general partner is imposed in express terms for violations of the provisions of the act. Indeed, it is difficult, on an examination of the various provisions, to escape the conclusion that where the legislature intended this result to follow, it so declared in unmistakable terms. The eighth section declares that, if any false statement be made in the certificate or affidavit required to be filed on the organization of the partnership, "all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." The case of Van Ingen *v.* Whitman, 62 N. Y. 148, and Durant *v.* Abendroth, 69 N. Y. 148, were founded on a violation of this section. Section 9 declares a similar penalty if the publication of the terms of the partnership shall not be made as required thereby, and the special partner was held liable for a non-compliance with this section in Smith *v.* Argall, 6 Hill, 479, which was affirmed on error (3 Denio, 435), the court saying: "The consequence is declared in plain terms; the partnership shall be deemed general." The eleventh section, which prescribes the manner of renewing or continuing a limited partnership, declares: "And every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership." Section 12 provides that every alteration "made in the name of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and any such partnership which shall be in any manner carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last section." In Beers *v.* Reynolds, 11 N. Y. 97, the special partner, before the time fixed in the certificate for the termination of the partnership, sold out his interest to the general partner, and took a mortgage on the goods to secure the consideration. It was held that this was a violation of the twelfth section, and that the special partner was liable as a general partner to a creditor who dealt with the partnership afterwards without notice. Section 13, as stated, prescribes the penalty of general liability where the name of the special partner is used in the firm name with his privity. Section 17 prohibits the special partner from transacting any business on account of the partnership as agent, attorney, or otherwise, and declares that "if he shall interfere contrary to these provisions, he shall be deemed a general partner." We have said that no case in this State has imposed the penalty of general liability upon a special partner for having the addition of "Company" to the firm name, where there

was but one general partner. Nor have we found any case imposing such liability for any departure from the act, except where this penalty is specifically prescribed. The case of Bank *v.* Gould, 5 Hill, 309, is not an exception. In that case the special partner had drawn out his contribution of capital, and it had been invested in real estate, used in the business, the title to which was conveyed to all the partners, general and special, as tenants in common. The court held that, assuming that this was done with the concurrence of the special partner, it was a violation of the seventeenth section of the act prohibiting the special partner transacting any business on account of the partnership. The withdrawal of capital contributed by him as special partner violates section 15 of the act, and the court further held that this would make him liable as a general partner. We are not prepared to say that an act so subversive of the whole policy of the statute might not be justly visited by the imposition of a liability as general partner, even if not so declared. But the withdrawal of capital by a special partner is a plain violation of section 12. It was an alteration in the capital or shares of the business. Judge Bronson, in the case cited, referred to the fact that the legislature evidently intended that the legal title to all the partnership property should be vested in the general partners. It was a most material change in the capital to withdraw the contribution of the special partner from the business and put it into land, the title to which was vested in all the partners jointly, including the special partner. Moreover, if the purchase of the mill, with the co-operation of the special partner, was doing business in violation of the seventeenth section, the withdrawing of his capital by his participation was an intermeddling with the business also. Both sections 12 and 17 specially declare the penalty of general liability for a violation of their provisions.

It is claimed in behalf of the plaintiff that as section 1 of the act declares that limited partnerships may be formed "upon the terms, with the rights and powers, and subject to the conditions and liabilities herein [in the act] prescribed," and as section 13 impliedly prohibits the use of the addition "Company" to a firm name where there is but one general partner, the conditions upon which a limited partnership is permitted have not been complied with, and that the parties stand as if the formation of a limited partnership had never been attempted. There was no irregularity other than the one specified. The certificate made and filed stated the "name or firm under which the partnership is to be continued." Section 4. The only defect in the proceedings is that the firm name, W. S. Alley & Co., was not permitted by section 13, under the circumstances. In a general sense, the use of a correct firm name may be a condition. But the statute carefully enumerates certain original conditions, the violation of which shall impose a general liability. The condition as to the use of the name of the special partner in section 13, and the condition as to publication of notice in section 9, are illustrations. Why should the legislature have made particular mention of

these and other failures to comply with the act, and prescribed the penalty of general liability in terms, if it was intended that every failure to follow the precise directions of the statute should be followed by this result? The act should have a fair and reasonable construction, and we think the defect in the present case did not render the proceeding void from the beginning, or impose on the special partner a general liability. See Peckham, J., Manhattan Co. *v.* Laimbeer, 108 N. Y. 582. By recent legislation the strict policy which prevailed under the original enactment has been departed from. It is now possible to continue the use of a former firm name on the constitution of a new partnership, although the names of those who become special partners in the new firm are found in the original firm name. Laws 1881, c. 425; Laws 1893, c. 263. We are not required, in the absence of binding authority, to impose a liability upon a special partner upon a technical and severe construction of the statute, not in harmony with legislative policy indicated by recent legislation. A party dealing with a firm having the word "Co." attached to the firm name would not be likely to give credit on the faith of that addition without knowing who were represented by it. The facts in relation to the organization of the special partnership of W. S. Alley & Co. were matters of public record, and it is not claimed that the names and character of the several co-partners were not posted on the building as required by the act. The case of Andrews *v.* Schott, 10 Pa. St. 47, in the Supreme Court of Pennsylvania, which has been followed in some of the other courts in that State, construed a section in the Limited Partnership Act of that State, similar to section 13 of the Revised Statutes in the act of this State. The court got by the difficulty that the legislature had not declared that the use of the word "Company" should make the special partner liable as a general partner, by saying: "No doubt the legislature supposed that the latter part of the sentence 'he shall be a general partner,' referred to the whole section." In this State the section has been frequently amended, and the phraseology upon the point now in question has remained unchanged. The court is not called upon to remedy an inadvertence or omission (if any occurred) in order to impose the penalty of general liability. The conclusion we have reached in this case does not, we think, contravene the statute, while at the same time it is not inconsistent with the present public policy of the State. The judgment of the General Term and of the Circuit should be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

GROVES *v.* WILSON ET AL.

168 Mass. 370: 47 N. E. 100. 1897.

PRIOR to June 10, 1887, Wilson, Cassells, & Hareson were partners, under the name of Wilson, Cassells, & Co., in Boston, when the firm was dissolved and the same parties formed a limited partnership under the same name. Cassells and Hareson were the general partners and Wilson the special partner; their place of business remained as before, and the sign over it was the same as had heretofore been used under their general co-partnership. The new firm succeeded to the business of the former one, having the consent of all the members of the firm thereto, if they were legally able to give such consent. All the provisions of the statutes relating to limited partnerships were duly complied with, unless the facts above set forth show a failure so to comply. The partnership having become unsuccessful in business, Cassells, without the consent and knowledge of the other partners, borrowed $400 of one Stetson, gave a promissory note therefor, signed Wilson, Cassells, & Co., and then used the funds for his own personal purposes. Plaintiff was the holder in good faith and for value of said note. If the defendant Wilson at the time of giving the note was liable as a general partner for the amount thereof in the firm of Wilson, Cassells, & Co., judgment was to be entered against him for the amount thereof and interest; otherwise the judgment of the Superior Court for him was to be affirmed.

S. L. Whipple, for defendant Wilson.

F. S. Hesseltine (*R. R. Gilman*, with him), for the plaintiff.

BARKER, J. Limited partnerships are regulated in this commonwealth by the provisions of Pub. St. c. 75, and of St. 1887, c. 248. By a clause of Pub. St. c. 75, § 3, if the name of a special partner was used in the firm name, he was made liable as a general partner, unless the name of the special partner so used was his surname and was also the surname of a general partner. But the limited partnership in which the defendant was a special partner, and in the name of which his surname appeared, was formed after the passage of St. 1887, c. 248, the first section of which allows such a partnership, which succeeds to the business of a former firm, to adopt and use the name of such firm, instead of the name prescribed by Pub. St. c. 75, § 3, with the consent of the members of the former firm, which consent was given in the present case. The plaintiff contends that, while the later statute made it lawful for the new firm to have the name of the old, yet the provision of the former statute, making the special partner whose name appeared in the name of the limited partnership liable as a general partner, was not specifically repealed, and makes the defendant liable as a general partner. The language of St. 1887, c. 248, is general, and is apt to include the case of a limited partnership formed to succeed to the business of a former firm, where the

same persons compose the two firms, and one or more of them became a special partner in the new firm. We must take this permission of St. 1887, c. 248, § 1, with the fourth section of the same statute, amending Pub. St. c. 75, § 12, as to the liability of special partners, and with the fifth section, repealing so much of Pub. St. c. 75, as is inconsistent with St. 1887, c. 248. The result is that, when the use of the name of a special partner in the name of a limited partnership is authorized by St. 1887, c. 248, § 1, there is a plain implication in the fourth section of that statute that the special partner is not liable as a general partner. This implication is to be given effect by holding that the provisions of Pub. St. c. 75, § 3, are in that respect modified by the later statute, the repeal extending to such cases, but leaving the provision of Pub. St. c. 75, § 3, to operate in cases where the use in the name of the limited partnership of the name of a special partner is not authorized by the statutes construed together.

Judgment affirmed.

PIERCE v. BRYANT ET AL.

5 Allen (Mass.), 91. 1862.

The certificate required by the statute was duly acknowledged and recorded February 16, 1860; but Goulding, the special partner, contributed his $5,000 as follows: On February 24 he paid $2,000 in cash, and delivered to Bryant, the general partner, a note for $1,000, signed by George Staples, payable on demand to Betsey A. Clark or order, and not indorsed by her; also two notes signed by himself, for $1,030, each payable to Bryant's order six months after date. On February 27, 1860, the two notes of Goulding were indorsed by Bryant, and delivered to firm creditors who received them as cash in payment of their claims. The Staples' note was paid by him to the firm April 2, 1860. Both Staples and Goulding were possessed of large property.

F. H. Dewey, for plaintiff.

D. Foster and *T. L. Nelson*, for Goulding.

Bigelow, C. J. If we adopt the most liberal rule of interpretation, in construing the statute regulating the formation of special partnerships, Gen. Sts. c. 55, we cannot, without violating its plain and explicit language, hold that the defendant Goulding is exempt from liability as a general partner for the debts of the firm. There was no substantial compliance by him with one of the essential requisitions of the statute. At the time the co-partnership was formed, and for a long time thereafter, he did not contribute to the common stock the specified sums, which he stipulated to furnish in actual cash payment as capital. In this particular, the certificate which he signed and acknowledged and caused to be recorded in the registry

of deeds contained a false statement. It certainly requires no argument to prove that the promissory notes of the supposed special partner, payable on time to the general partner, and which, when negotiated, constituted a debt for which both members of the firm were liable, was in no legitimate sense a contribution of money to the common stock. Such a procedure was a clear violation of the letter and spirit of the statute. It created no fund or capital to which persons dealing with the firm might look for the payment of their debts, but substituted in its place a debt for which each partner was severally liable. Nor can the note of a third person, not indorsed by the payee, and of which Goulding and the co-partnership were equitable owners, be regarded as equivalent to money. A note is an agreement to pay money. It cannot be treated as cash. It is quite immaterial that it does not appear that credit was given to the firm by the plaintiffs, or by other creditors, in consequence of the supposed payment by the alleged special partner of his proportion of the capital, and that it is not shown that loss or injury has been sustained by any one in consequence of the failure to comply with the requisitions of the law. Such evidence, from the very nature of the case, it would be difficult to obtain. It was not intended by the provisions of the law that any such burden of proof should be thrown upon the creditors. In the place of an inquiry into any such doubtful and speculative questions, the statute substitutes the plain, unequivocal, and explicit provision, that if a false statement is made in the certificate, all the persons interested in the co-partnership shall be liable as general partners. For the same reason, it is unnecessary to show any *mala fides* in making the certificates. Parties are bound to know the truth, and they cannot be permitted to say that they acted in good faith, in certifying to that which was in fact false.

It is a mistake to suppose that, in adopting from the civil law the principle of a special or limited co-partnership, the legislature intended also to ingraft on the stock of the common law all the rules of construction which are applied to such a contract in those countries where it forms a part of the regular system of public laws. To have done so would have been to make a great inroad on the well settled doctrines of the common law applicable to partnerships, especially on that fundamental rule that he who enters into a contract by which he is to contribute capital and share in the profits of the firm shall be liable *in solido* for its debts. The intent of the statute is to relax this rule only on certain conditions and within fixed and prescribed limitations. If these are not fulfilled, or are disregarded, then the statute applies rigorously the rule of the common law, by subjecting all the members of the firm indiscriminately to the liabilities of general partners.

It was suggested by the counsel for the defendants, that the statute does not require that the money contributed by the special partner

should be paid in at the time of making and acknowledging the certificate for registry, and that it is a sufficient compliance with the requirements of the law, if it is paid in after the expiration of the time fixed for publication of the certificate in the newspaper. Whether this be so or not is quite immaterial to the decision in the present case, inasmuch as the capital which the special partner was to furnish was not paid in until long after that period of time had elapsed. But we are satisfied that the terms of the statute do not support the suggestion. The parties are required to certify to that which has been done, not to that which is executory. The payment of the capital in cash by the special partner must precede the publication, otherwise it would be impossible to make a true certificate. And this payment must be followed by the required publication; otherwise the special partnership will not be formed, but the parties will become general partners. This construction can work no hardship, because it is easy for the special partner to see that all the statutory provisions are complied with. *Judgment for the plaintiff.*

METROPOLITAN NAT. BANK *v.* SIRRET ET AL.

97 N. Y. 320. 1884.

ANDREWS, J. The only questions before the General Term were questions of law arising upon exceptions taken by the plaintiff on the trial before the jury. The trial judge upon the application of the plaintiff's counsel, made after verdict, directed that the exceptions of the plaintiff should be heard in the first instance at General Term, and that in the meantime judgment should be suspended. Upon a motion for a new trial upon exceptions ordered to be heard in the first instance at General Term, all controverted questions of fact are to be regarded as settled by the verdict of the jury, and neither the General Term, nor this court, will consider the weight of evidence, or set aside the verdict on the facts, unless, indeed, there was such an absence of evidence to support a material finding, that the court can determine as a matter of law that the fact found was unproved, in which case an exception by the party against whom the verdict was directed, to the refusal of the court to direct a verdict in his favor, would be well taken.

Among the controverted questions of fact which were settled by the verdict was that relating to the day on which the firm of Sirret & Stafford deposited to their credit in the Third National Bank of Buffalo, the check of William B. Sirret for $40,000, given to the firm for his contribution of capital to the special partnership. If the check was deposited December 28, 1875, the day on which the affidavit of Stafford, the general partner, was made, and the payment

was otherwise valid and effectual, then the partnership, so far as the contribution of capital was concerned, was regularly constituted. The account of William B. Sirret at the bank was good for the check. The check was drawn, dated, and delivered to Sirret & Stafford on the 28th. The only controversy at the trial on this branch of the case was whether the check was actually deposited by Sirret & Stafford in the bank on which it was drawn, and was credited by the bank to their account, on the 28th as claimed by the defendant, or on the 29th as claimed by the plaintiff. The question was submitted to the jury. The evidence did not conclusively establish either claim, and whatever we may think as to the weight or preponderance of evidence, the finding of the jury is conclusive.

The main point of controversy on the merits grew out of the circumstances attending the transfer of the stock of goods of William B. Sirret & Co. to Horace Stillman on the 28th of December, 1875, for the sum of $33,164.08, and the purchase by Sirret & Stafford from Stillman of the same stock for the same price on the 30th December, two days after the original sale. It was claimed by the plaintiff on the trial, and the claim is strenuously urged in this court, that assuming that William B. Sirret delivered to Sirret & Stafford $40,000 in cash on the 28th of December, 1875, as a compliance in form with the requirement of the Limited Partnership Act that the contribution of the special partner to the capital of the limited partnership "shall be paid in cash," nevertheless the alleged payment in this case was a mere pretence and was resorted to as a cover or device to evade the statute, and that in fact and law the transaction proved was a putting in by William B. Sirret of the stock of the previous firm of William B. Sirret & Co. as his contribution as special partner to the extent of $33,164.08, to the capital of Sirret & Stafford. The question was submitted by the trial judge to the jury, and in a variety of forms he instructed them that if the transaction disclosed by the evidence was a mere contrivance to evade the statute and to enable William B. Sirret to put in the goods instead of the cash, as capital, then the legal effect was the same as though William B. Sirret had put in the goods directly, and if so no check had been given. The jury found for the defendant upon this issue also, and unless the uncontroverted facts establish as matter of law that the transaction was an evasion and violation of the statute, their finding cannot be disturbed.

It is well settled that under the Limited Partnership Act the contribution of capital by the special partner must be made in cash, and that payment in anything else will not satisfy its requirements. Van Ingen *v.* Whitman, 62 N. Y. 513; Durant *v.* Abendroth, 69 Id. 148. In this case there was a formal compliance with the act. William B. Sirret, the special partner, as the jury have found, did pay to Sirret & Stafford, on the 28th of December, $40,000 by his check, which represented money, and which the firm converted into

money before the making of the affidavit by the general partner on that day. On the 30th of December, $33,164.08 of this money was applied by Sirret & Stafford in the purchase from Stillman of the stock of goods originally belonging to William B. Sirret & Co., which stock William B. Sirret, acting for William B. Sirret & Co., had sold to Stillman for the same sum. It is undoubtedly true that it was the expectation of William B. Sirret, and of the other members of the firm of William B. Sirret & Co., before the actual organization of the firm of Sirret & Stafford, that the latter firm, on being organized, would purchase the stock of the former firm for the use of the new firm, and pay for the same out of the money which should be contributed by William B. Sirret under the limited partnership agreement as his capital in the new firm, and, further, that the sale to Stillman, and from Stillman to the new firm, was then contemplated. We are of opinion, however, that the question of intent and good faith was properly submitted to the jury, and that the transaction as disclosed by the evidence could not as a matter of law be adjudged a fraud upon the statute.

The jury must be deemed to have found, as they were justified in finding, upon the evidence, that William B. Sirret, in organizing the limited partnership firm, was actuated by honest and justifiable motives, and that it was not organized to escape his liability as partner in the firm of William B. Sirret & Co., by saddling the debts of that concern upon the new firm. In organizing the new firm, which was to conduct the same business as the former one, William B. Sirret was necessarily confronted by the question of the disposition to be made of the stock of the firm of William B. Sirret & Co., of which, practically, he was the sole owner. The jury have found that the stock was needed by the new firm in its business, and that the price paid was fair and reasonable. There is nothing in the Limited Partnership Act which prohibits a limited partnership from dealing with or buying goods for its business from the special partner. Transactions between the firm and the special partner may be fraudulent in fact as to the creditors of the firm. But there is no disability to engage in such dealings imposed by the terms of the act, nor are such dealings, fairly conducted, inconsistent with the purposes or objects of a limited partnership. That such a dealing is permitted has been decided by the Supreme Court of Pennsylvania, under a statute almost identical with our own, and the same principle is recognized in the French law, from which the principle of partnership is derived. McKnight *v.* Ratcliff, 44 Pa. St. 156; Troubat on Lim. Partn. § 307.

It is easy to conceive of cases where the acquisition by the firm of a property right or interest belonging to the special partner might be in the highest degree to the advantage of the firm, or even essential to the successful prosecution of its business. There would therefore have been no legal objection to a purchase by Sirret & Stafford from

William B. Sirret of his stock of goods, if it had not been preceded by an expectation or understanding, existing when the firm was organized, that such purchase would be made. It may be that if, antecedent to the payment of the $40,000 by William B. Sirret to Sirret & Stafford, there was an agreement by which Sirret & Stafford had obligated themselves to purchase this stock of goods, and pay for it out of the fund contributed by William B. Sirret, the payment could not be upheld as a payment by the special partner of his capital, in good faith in cash, under the statute. It would be a payment connected with an antecedent agreement restricting the liberty of the general partners in the use of the money, and practically appropriating it in advance. But the evidence fails to establish that there was any agreement binding upon Sirret & Stafford to purchase the stock, or which deprived the firm of the legal liberty to disregard and repudiate any prior understanding with reference to the purchase, or which prevented it from using the money received from William B. Sirret in the firm business in any manner it should see fit. It is true Sirret & Stafford met the expectation of the parties and bought the stock, and thereby William B. Sirret was enabled to receive $33,164.08 of the money paid into the firm. He did not receive it, however, as a return of his capital paid in. The transaction on his part was not in form or in legal effect the same as though he had put in the goods as part of his capital, instead of the money. The money when paid was beyond his control, and placed in the legal possession of the general partners, and was subject to any disposition they might make of it. The purchase, in effect, was a transaction of the firm after the firm had been organized, and not the consummation of a prior contract, or at least the jury were at liberty so to find.

There is nothing in the letter of the Limited Partnership Act to prevent the change of an existing general partnership into a limited one. The practical convenience of such a proceeding, in many cases, is manifest. It enables a general partner who, by reason of age or infirmity, or upon any other ground, desires to withdraw from the active management of the business, to place it in the hands of his co-partners, risking only his capital, and at the same time securing to the new concern the good-will and business advantages possessed by the former one. The practical arrangements by which such a change is effected usually include the taking by the limited partnership of the assets of the general partnership. The special partner cannot put in his stock in the old concern upon a valuation, as his capital, because the statute requires it to be paid in in cash. But the statute does not prohibit the limited partnership from purchasing in good faith of the former firm, or from paying for it out of the capital contributed by the special partner, although it may happen that the latter is enabled to receive the greater part, or the whole of the purchase money, and is placed in substantially the same position as if he had originally put in the stock as capital instead of money. The

transaction is not a withdrawing of the capital of the special partner. It is the employment of that capital in the business of the limited partnership. If the purchase of the stock was made a condition of his contribution of capital, a different question would be presented. But where a limited partnership is at liberty to purchase the stock, or to use the fund for any other partnership purpose, bad faith in constituting the partnership is not a legal inference from such a transaction, and this, although the expectation that the new firm would make the purchase existed when the partnership was formed. The case of Lawrence *v.* Merrifield, decided in the New York Superior Court, and reported in 10 Jones & Spencer, 36, and affirmed in this court, 73 N. Y. 590, tends to support the conclusion we have reached upon this branch of the case.

The exception to the denial of the plaintiff's motion to compel the defendant, William B. Sirret, to produce the books kept by him as county treasurer, is not available for the reason that it is wholly immaterial to the issue whether the money loaned by William B. Sirret to Stillman to pay for the stock of goods was or was not advanced out of the funds received by Sirret as county treasurer. The county of Erie makes no complaint of the misuse of its funds. The pecuniary responsibility and solvency of William B. Sirret at the time of this transaction was assumed on the trial. The loan was made by means of a check upon his general account, and if that account was made up of county funds, it was made good for the amount withdrawn on the 28th of December, by a deposit of the same amount to the credit of the account on the 30th of the same month. Whether William B. Sirret borrowed the money to loan to Stillman from a friend, or took it temporarily from the funds of the county, was not, we think, a material circumstance bearing upon the question whether the $40,000 paid to Sirret & Stafford was in fact paid, or was paid in good faith.

The plaintiff's counsel at the conclusion of the evidence moved the court to direct a verdict for the plaintiff on several grounds not involved in the foregoing discussion.

First. The objection that the provision in the certificate filed on the 28th of December, 1875, permitting the special partner to draw the interest on his capital monthly, was a violation of the provision in the fifteenth section of the Limited Partnership Act, which permits the special partner annually to receive lawful interest on his capital, under the circumstances stated in that section, is not, we think, well taken. The stipulation in the partnership articles, which were filed as the certificate, for periodical payments of a proportionate part of the annual interest, fairly construed, relates to the interest earned at the time such payments are provided to be made, and is not a violation of the statute. The word "annually" in the fifteenth section has, we think, the same meaning as "per annum" or "by the year," and, like the statute of usury, this section is not violated by a

provision that the annual interest may be paid quarter yearly, or at any other stated periods less than a year.

Second. The provision in the partnership articles that the special partner should bear a proportion of the losses was in the interest of creditors, and there is nothing in the act prohibiting the special partner from extending his liability by agreement with the general partners, or assuming risks beyond the loss of his capital.

Third. The certificate filed on the renewal of the partnership, December 5, 1877, stated all the facts required to be stated by the fourth section of the act. The notice published was a copy of this certificate. The ninth section requiring publication of the terms of the partnership is satisfied, we think, by a publication of the certificate, and an omission to state in the published notice all the details of the partnership agreement, is not a failure to comply with the provision as to publication, so long as the notice contains all the facts required by the fourth section. Troubat on Lim. Partn. § 84.

Fourth. The change in the name of "The Buffalo Daily Dispatch and Evening Post," one of the newspapers in which the notice was directed to be published, to that of "The Buffalo Evening Post," made after the publication was commenced, did not, we think, affect the validity of the publication. The identity of the paper was not lost by a change of name merely, and the purpose of the statute was accomplished by continuing the publication in that paper under the changed name.

Fifth. The court would not have been authorized to direct a verdict on the ground that when the certificate and affidavit for the renewal of the partnership were made and filed, the capital of William B. Sirret, the special partner, had been impaired. There was not only no conclusive evidence of the fact, but we are unable to find any evidence which affords ground for anything more than a conjecture that such a fact existed. But, however this may be, the question could not be ruled as one of law.

We are of opinion that no legal error was committed on the trial, and that the order of the General Term, granting a new trial, should be reversed, and the judgment rendered for the defendant on the verdict.

All concur. *Order reversed, and judgment accordingly.*

FIRST NAT. B'K. OF DANVILLE *v.* CREVELING ET AL.

117 Pa. St. 267: 35 At. 595. 1896.

STERRETT, C. J. In this case it was successfully contended by plaintiff bank that defendants were liable as general partners because of their failure to comply with some of the provisions of the act of June,

1874, and its supplements, under which, in March, 1880, they undertook to organize themselves into a partnership association limited; and judgment was accordingly entered against them. In October, 1879, the three defendants above named formed a general co-partnership, in the name of Creveling, Miles, & Co., and soon thereafter they purchased, on credit, the property known as the "Chulaski Furnace." For the entire consideration ($20,000) a purchase-money mortgage was given, payable in quarterly instalments of $1,250 each. The first instalment was paid, but before the second became due, the partners undertook to change their general partnership into a partnership association limited, under the act aforesaid. In their recorded articles of association, etc., they certified that the amount of the capital of said partnership association, limited, was $99,000, consisting of, first, real estate described in schedule annexed thereto, etc., at a valuation of $75,000 fixed upon it, and approved by all the members subscribing to the capital of the association. The schedule thus referred to as attached to and made part of the articles of association contains the following description of the real estate mentioned and referred to as forming part of the foregoing certificate and statement of Creveling, Miles, & Co., Limited, contributed to the capital stock thereof at a valuation of $75,000, in equal proportions, by the members thereof, to wit: "All that certain tract of land and furnace thereon erected, situate in Point township, Northumberland County, Pennsylvania, containing one hundred and fifty-four acres and one hundred and forty-two perches, strict measure. To this is appended the certificate of the defendants, Creveling, Levis, and Miles, in which they "certify and declare that the foregoing schedule is a true and correct description of the real estate contributed by us to the association of Creveling, Miles, & Co., Limited, at a valuation of $75,000, approved by us who are all the members subscribing to the capital of said association." Not a word is said as to the purchase-money mortgage incumbrance of $20,000, on which only $1,250 had been paid. It requires neither argument nor citation of authority to show that there was a manifest failure to comply with the provisions of the act in this regard. The statement not only fails to furnish any notice to creditors of the existence of the mortgage lien, but it is positively misleading, in that it does not certify the character of the property "according to the fact."

Those who seek to have all the advantages of a general partnership, and yet limit their liability to creditors, as contemplated by the act, must comply with all its provisions; otherwise, they will be liable as general partners. The object in requiring a schedule of property contributed in lieu of cash was to enable creditors to ascertain precisely of what the property consisted, and to judge of its value. Maloney *v.* Bruce, 94 Pa. St. 249; Vanhorn *v.* Corcoran, 127 Pa. St. 255; Gearing *v.* Carroll, 151 Pa. St. 79; Haslet *v.* Kent, 160 Pa. St. 85. The contributed real estate, as correctly stated by the learned referee, "was in effect an equity of redemption in the Chulaski Furnace property,

which might have been set forth and described in any one of several forms. The mere description of the real estate was accurate enough if the statement had also been made that it was subject to a purchase-money mortgage of $20,000, of which $1,250 had been paid. The failure to do this leaves even the valuation doubtful, for it may be thought, on the one hand, that the whole property is worth $75,000, considered clear of incumbrances, or, on the other hand, that the equity of redemption is worth $75,000. If the valuation of the whole property were $75,000, the effect of it, in this case, would be to render the whole statement false, because, as the $75,000 would be subject to a deduction of $18,750, it would follow that the net value of the property as put into the association was but $56,250; and, as the additional capital subscribed was but $24,000, the whole capital would be $80,250, instead of $99,000, as set forth in the articles." For those and other reasons, the learned referee rightly concluded that the certificate is ineffective to create a valid partnership association, limited, under the act. He and the court below were also right in holding that the defendant also failed in other respects to comply with the requirements of the act in question. We find nothing in the record that would justify us in sustaining any of the specifications of error, nor do we think that either of the questions therein presented requires further notice.

Judgment affirmed.

WHITE ET AL. *v.* EISEMAN ET AL.

134 N. Y. 101. 1892.

VANN, J. The primary object of the act authorizing limited partnerships was to encourage those having capital to become partners with those having skill, by limiting the liability of the former to the amount actually contributed to the firm. The next and incidental object was to furnish reasonable protection to those dealing with the concern by requiring acts to be done and public notice thereof given, so that all who desired might know the essential features of the arrangement. In order to prevent evasion and fraud, it was provided that any false statement in the certificate or affidavit should render all the partners equally liable. That provision, however, was not designed as a trap to catch the innocent and unwary, but as a bar to shut out the dishonest and fraudulent. While the courts were at first inclined to a strict construction against those thus seeking exemption from the common-law liability of partners, the tendency in this State is now toward a liberal construction, so as to accomplish the wise purpose of the act by uniting capital and labor in business enterprises, without excessive hazard to the former. President, etc., Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 582; Fifth Avenue Bank *v.* Colgate, 120 Id. 381, 396; Metropolitan National Bank *v.* Palmer, 30 N. Y. S. R. 509; Levy *v.*

Lock, 47 How. Pr. 394; Lawrence *v.* Merrifield, 10 J. & S. 36; s. c. 73 N. Y. 590; Ropes *v.* Colgate, 17 Abb. N. C. 136; 13 Am. & Eng. Cyc. of Law, 807.

The more recent cases regard the statute as remedial in nature, and, looking to substance rather than form, protect those who, in good faith, substantially comply with the essential requirements. We now have a case before us where nothing of substance was omitted. The defect complained of neither misled nor injured the creditors who seek to take advantage of it. Payment having been made in the usual way practised by business men, who regard a check for adequate funds behind it as cash, an affidavit was made accordingly, and the good faith of the affiant is questioned by no one. There was no intentional violation of the statute, and the failure in literal compliance consisted of the fact that the affidavit was not technically true when made, although both affidavit and certificate were true when filed. The exact question, therefore, presented for decision is whether there is substantial compliance, if the affidavit and certificate are true when, for the first time, use is made of them for a purpose contemplated by the statute?

In support of the plaintiff's theory, we are referred to the case of Durant *v.* Abendroth, 69 N. Y. 148, where it was said, in behalf of the four judges whose votes were effective, that the certificate and affidavit speak as of the day of their date. p. 152. This, however, was not essential to the decision, nor was it regarded as controlling, for in the third sentence following it is said that good faith would be of no avail "if the payment had not been actually made in cash when the certificate and affidavit were made and filed." As that affidavit was filed on the day it was made, it spoke from the common date of making and filing, and the remark of the court relied upon by the plaintiffs is without special significance. In that case, the only payment made was by an uncertified check dated eight days after the certificate and affidavit were filed, and it was not paid until the tenth day thereafter, yet this court has pronounced it "a very stern and technical application of the statute" to hold the special partner liable, even under those circumstances, and has declared that the principle should not be extended. President, etc., *v.* Laimbeer, *supra*, 589.

According to the statute, the partnership is not formed until the certificate has been recorded and the affidavit filed. 4 R. S. 8th ed. p. 2493, § 8. The organization of the firm is completed by the filing of these papers, for the omission of the clerk to record was held in the case last cited not to affect the liability of the special partner. The date of this culminating act, therefore, is of the highest consequence, because it is the time when the firm becomes ready for business, and when the safeguards should exist that are designed to protect third parties. As was well said in a recent case: "It is the act of filing the certificate and affidavit which gives life to the partnership and confers immunity for the debts of the firm upon the special partner, and from that moment those who deal with the partnership become entitled

to know the truth as to its formation, and from and after that time a wrong is done to those who deal with it, if a false statement is published through the filing of the certificate. The truth of the statements contained in the certificate is to be determined, therefore, at the time of its being filed with the county clerk. If true at the instant of filing, there is no liability, because, being true at the instant of the creation of the limited partnership, they fulfil the purpose for which the law was enacted." Ropes *v.* Colgate, *supra*, 143. We adopt this language as applicable to the case in hand, and extend it, in view of the circumstances already stated, to the affidavit filed with the certificate. In reaching this conclusion, we are guided by the object of the legislature in passing the statute, which should not be defeated by exalting the letter and subverting the spirit. The formation of limited partnerships should not be made difficult or dangerous by technical construction. If every statement contained in the papers required to be filed is true at the time of filing, nothing further is necessary for the protection of creditors, who are thus given all the information that it was the policy of the statute to furnish. More than this should not be exacted in the absence of an actual intent to deceive. As the special partner cannot make the affidavit himself, § 7, he should be protected if it is true when filed, as that is the first use that is made of it, and the occasion when he is first charged with the duty of examining it. It is then that it becomes material, and then that it must be true, at the peril of general liability if it is untrue. If upon then examining it he finds its contents were true, it would be a harsh and unreasonable rule to require him to ascertain, if he could, the precise date when the check was cashed or certified, and, comparing it with the date of the jurat, to decide, at the peril of losing all he had, which date preceded the other. The affidavit is simply evidence of the facts therein stated, and if those facts are true when such evidence is first used, the statute is satisfied, unless some furtive purpose existed when the verification was made. If any business had been done between the making and filing, or if it had been a mere artifice to evade the statute, or if any creditor had been misled by the technical inaccuracy of statement, when viewed from the date of the jurat, a different question would have been presented from that now before us.

Our reasons for holding that the affidavit was true when filed may be stated in a few words. The check was delivered to the general partners on the third, certified on the fourth, deposited to the credit of the firm on the fifth, before the papers were filed, but was not paid to the bank where it was deposited until the sixth. (The certificate and affidavit were made on the third. — Ed.)

The general rule relating to the payment of capital by the special partner, as stated by Mr. Bates in his work on Limited Partnerships, § 45, is that "The fund must be in existence in money and in the sole control of the general partner on the day the partnership is formed, free from all contingencies except those arising from the proper busi-

ness of the concern." This is in substantial accord with the authorities, which hold that payment in goods, notes, or even government bonds, worth more than par, is insufficient. Van Igen *v.* Whitman, 62 N. Y. 513; Haviland *v.* Chace, 39 Barb. 283; Haggerty *v.* Foster, 103 Mass. 17.

In Durant *v.* Abendroth, *supra*, the certificate and affidavit were filed December twenty-third, on which day post-dated checks, payable December thirty-first, were given by the special to the general partner, but they were not paid until the second of the following month, and it was held that this was not a payment in cash. The court, however, said: "If the special partner had paid the money to the bank to the credit of the general partners, or deposited it with any third party for the express purpose of being paid to the firm at the commencement of the partnership, and had appropriated it to that purpose in such a manner as to part with all control over it, there would be much force in the argument that this was a payment of his contribution of capital." Page 153. In the Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320, the usual papers were filed with the county clerk, a check drawn, dated, and delivered by the special partner to the general partners, and the check deposited by them in the bank, on which it was drawn to the credit of the firm, all on the same day. No money was actually paid, but as there was a transfer of credit by the bank from the special partner to the partnership, it was held sufficient. In the Metropolitan Bank *v.* Palmer, 30 N. Y. S. R. 509, the delivery of a certified check was held a valid payment within the meaning of the act, because "The capital was as completely subjected to the control and disposition of the firm as though the money were drawn upon it and it was in form paid over in cash." See also Lineweaver *v.* Slagle, 64 Md. 465, and Siebert *v.* Bakewell, 87 Pa. St. 506.

We think that where the money is actually in the bank to the credit of the special partner, and he gives absolute and final control of it to the general partner, it should be regarded as a payment in cash. The delivery of a certified check to the payee has this effect. Clewes *v.* Bank of New York, etc., 89 N. Y. 418; Meads *v.* Merchants' Bank of Albany, 25 Id. 143; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 125.

While the check in question was delivered by the special partner on the third without certification, it was presented to the bank by the general partner on the fourth, and certified while in his hands. In other words, when it was in his power to obtain cash on the check, he procured it to be certified instead of paid, which, as between the firm and the special partner, was a payment, and discharged the latter from liability on the check. First National Bank of Jersey City *v.* Leach, 52 N. Y. 350. On the same day the bank charged the amount of the check to the special partners on their bank book, and deducted it from the balance to their credit. Thus the special partners lost control of the money; the general partners obtained control of it, and there was

an absolute, final, and irrevocable appropriation of it to the use of the firm on the fourth, or the day before the certificate and affidavit were filed.

We think that the exception taken by the defendants requires a new trial.

The judgment should be reversed and a new trial granted, without costs to abide event. All concur.

Judgment reversed.

MYERS *v.* EDISON GENERAL ELECTRIC CO.

59 N. J. L. 153: 35 At. 1070. 1896.

McGILL, CH. This action is for the recovery of an indebtedness for rent, due to the defendant in error from the firm of Poggi & Co., composed of William E. Poggi, Edith A. Poggi, and Charles R. Myers, doing business in the city of New York. Charles R. Myers defends, upon the ground that he was a special partner in the firm, and that, because thereof, his liability for the debts of the firm is limited to the \$5,000, which he contributed to the capital, no part of which was withdrawn. The partnership was formed under the statute of the State of New York relating to limited partnerships, which, among other things, provides that, when the certificate of such a partnership required by the statute shall be filed, an affidavit by one or more of the general partners shall also be filed in the same office, "stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash," and also that, "If any false statement be made in such . . . affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." 1 Rev. St. N. Y. p. 765, § 8.

The case was tried before the circuit judge in Essex County, a jury having been waived, who found, as facts, that the partnership commenced on the 5th of January, 1892; and that on that day, in pursuance of the requirement of the statute, a certificate that Charles R. Myers had contributed the sum of \$5,000 as capital to the common stock of the partnership, together with an affidavit made by William E. Poggi, that "The sum of five thousand dollars, the capital to be contributed to said firm by the special partner, Charles R. Myers, has been actually and in good faith paid in in cash," were duly filed; and, also, that the money so sworn to have been actually paid on or prior to the 5th of January, 1892, was not actually paid until the 12th of January in that year. The latter finding is, in effect, that the affidavit was false, within the meaning of the statute, in the particular that at its date the \$5,000 was actually paid. This finding of the judge appears to have been upon conflicting evidence, which would admit of

his conclusion, and therefore not to be subject to review upon error. Doolittle *v.* Willet, 57 N. J. Law, 398. We deem the finding of the fact stated to be decisive of this case. Because of the false statement in the affidavit, the statute, as has been seen, expressly makes the defendant, Myers, liable for all the engagements of the partnership.

In Durant *v.* Abendroth, 69 N. Y. 148, the Court of Appeals in the State of New York dealt with a case in which the partnership was entered into on the 23d of December, 1870, on which day affidavit was duly made that the money specified in the certificate of partnership to have been contributed by the special partner "has been actually and in good faith paid in cash," when the fact was that on that day the special partner gave his check, dated December 31, 1870, which was paid on the 2d of January, 1871. Upon this state of facts, the court held that the affidavit was false, within the meaning of the statute, and that the intended special partner was liable as general partner for the debts of the firm. Judge Rapallo, who delivered the opinion of the court, said: "The statute peremptorily requires an affidavit that the capital has been actually paid in cash, and withholds its protection from the special partner if the affidavit be not true. The object of this provision is to secure certainty, and to prevent equivocal transactions in the formation of these partnerships. Nothing but cash satisfies its requirement. No engagement or security, however good, can be substituted even temporarily, and the affidavit of the actual payment must be filed with the certificate. However honest the intention of the parties may be, if this affidavit is not absolutely true, the consequences prescribed by the statute must follow, and they cannot be averted by a subsequent payment, nor by the consideration that no injury resulted to any creditor from the affidavit not being true when made. The payment in this case was made by a check of the special partner, dated, and therefore payable, on the 31st of December, 1870. This, clearly, was not cash on the 23d, when it was delivered to the general partners, and the affidavit was made. It was, in fact, paid on presentation, on the 2d of January, 1871." So far as the question we consider is concerned, the case thus decided appears to be precisely in point. It is the deliverance of the Court of Last Resort of New York, and it remains undisturbed. Buck *v.* Alley, 145 N. Y. 488, 494. It coincides with our interpretation of the statute, and therefore it is not necessary that we shall determine its importance as an authoritative interpretation of the meaning of the law. Print Works *v.* Lawrence, 23 N. J. Law, 590; Black *v.* Canal Co., 22 N. J. Eq. 422.

Other questions are presented by the assignment of error; but, as the point decided is sufficient to sustain the plaintiff's recovery, it is unnecessary to pass upon them.

The judgment of the Supreme Court will be affirmed.

§ 4. Notice to Creditors.

TAYLOR *v.* RASCH ET AL.

11 N. B. R. 91: 1 Flip. 385. 1875.

Plaintiff, as assignee in bankruptcy of Tillman, Silsbee, & Co., sued defendants, as partners, for furniture sold and delivered to them by plaintiff's assignors, of the agreed value of $523.25, less $50 paid in clothing sold and delivered by defendants to an employee of said assignors. Defence that the firm of Tillman, Silsbee, & Co. agreed with defendants, that if the latter, or either of them, would purchase furniture of Tillman, Silsbee, & Co., that then the said firm, or any of its members, would purchase clothing of the defendant in payment of the same; and that pursuant to said agreement William Tillman of said firm purchased and received clothing from the defendants to the value of $438.

Ashley Pond, for the complainant.

O. Kirchener and *G. V. N. Lothrop*, for defendants.

Longyear, Judge. The firm of Tillman, Silsbee, & Company was a limited partnership, and was composed of William Tillman and Charles E. Silsbee as general partners, and John S. Newberry as special partner. Whatever the proofs show as to the general partners being parties to the arrangement for exchange of patronage between them and the defendants, or as to what the particular character of that transaction was, one thing is certain, and that is, there is no proof or pretence that the special partner was in any way privy to the arrangement, or knew of it, or in any way assented to it. It is contended, however, that by the statutes of Michigan the general partners had authority to bind the firm. The statute referred to is as follows: "§ 3. The general partners only shall be authorized to transact business, to sign for the partnership, and to bind the same." 1 Compiled Laws of 1871, p. 520, § 1569. The effect of the statute is simply to exclude the special partner from active participation in the business of the firm; and as to the general partners, it confers no authority upon them to transact business, sign for the partnership, and to bind the same in any manner or to any extent whatever beyond the purposes and scope of the partnership. Therefore, conceding that the arrangement in question was made with the general partners, as claimed in the answer, if it was not within the scope and purposes of the partnership, it was wholly unauthorized and therefore void. This brings us to the second and only remaining issue made by the answer.

The scope and purposes of the partnership are specified in the articles to be as follows: "Second. That the general nature of the business to be transacted by said partnership is the purchase, sale, and manufacture of all kinds and descriptions of furniture, chairs, upholstering, furnishing and upholstering goods, lumber, and all kinds of articles, merchandise, tools, and machinery, used in such manufactures."

Surely it does not require argument to show that a contract for the purchase of clothing for the individual general partners, or otherwise, does not come within "the general nature of the business to be transacted by said partnership," as specified in the articles.

But it was contended that such had been the usual course of business of the firm, and proofs were adduced tending to show that such was the fact; and it was argued that therefore the defendants had a right to assume that the transaction was within the scope of the partnership. The articles of co-partnership were duly filed and published, as required by the statute, and all persons dealing with the firm were bound to take notice of and were chargeable with knowledge of their contents. No departure by the general partners, no matter how common or long continued, if not consented to, or known and acquiesced in by the special partner, could have the effect to change or enlarge the scope of the business as specified in the articles. To hold the contrary would be to disregard plain provisions of law for the protection of special partners and the public, and would make a limited partnership one of extreme hazard to the special partner.

In the opinion of this court, overruling the demurrer to the bill (5 N. B. R. 399), it was shown that a general partnership could not be made liable upon a contract by an individual partner out of the scope of the partnership business. The same principle of law that protects general partners from liability in such cases protects the capital of special partners in a limited partnership. Troubat on Lim. Partn. § 377.

It results that the complainant is entitled to a decree against the defendants for the balance of the account of Tillman, Silsbee, & Co. against them, after deducting $50 paid to the firm by one of its employees on account of defendants, with interest and costs.

Decree accordingly.

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§ 5. Creditors may be Estopped.

HARLAN, J., in TRACY et al. v. TUFFLY.

134 U. S. 206, 226–228. 1889.

The jury were instructed: "If you shall find from the evidence that the limited partnership, as stated and claimed by plaintiff, was recognized as such in its inception by the three attaching creditors, defendants herein, and likewise during its existence was dealt with and credited as such by them, as well as sued therefor and its property attached as such after its assignment, and that its other creditors also treated and dealt with it, and accepted its assignment to plaintiff as such, and that Mrs. McLin, named therein as special partner, and W. T. Tuffly, named therein as the general partner, and whose name constituted the firm name, always treated it as a limited partnership, and that Mrs.

McLin loaned it money as claimed, and subsequently sued the plaintiff as its assignee therefor, then you likewise may deem the same a limited partnership, and regard the assignment to plaintiff as valid. If you shall also find that the same was made at a time when the W. T. Tuffly paper was maturing faster than it could be met in the ordinary and usual course of business, and that such assignment was made in good faith in contemplation of insolvency; and if you shall further find that the defendant Tracy, as United States marshal, seized the property so assigned, under, and by virtue of, the attachments of the three creditors who have made themselves defendants herein, then you will find for the plaintiff as against defendants Tracy and the sureties on his official bond, and the three firms of attaching creditors for the value of the goods as they were at the time and place of their seizure under such writs of attachment, such value to be ascertained from all the facts detailed in evidence before you. But if you shall otherwise find as to the facts constituting the rights of the parties as hereinbefore set forth, then and in such case your verdict will be for the defendants."

According to the bills of exceptions, there was evidence tending to prove all the facts stated in these instructions. The attaching creditors, with other creditors, described them in the release executed by them at about the time of the formation of the limited partnership as constituting a limited partnership, in which W. T. Tuffly was the general, and Mrs. McLin the special, partner. If the attaching creditors thus recognized and dealt with W. T. Tuffly and Mrs. McLin as a limited partnership, they are estopped from insisting that there was no such partnership, or that the assignment was not valid as an assignment by a limited partnership. They cannot be permitted thereafter to raise the objection that the terms of the partnership were not sufficiently stated in the published notice of its formation. Those terms were fully set forth in the recorded certificate of the partnership.

But as the defendants contended that their recognition of the limited partnership was in ignorance of material facts bearing upon that question, and therefore they were not estopped, the court, at their instance, further instructed the jury: "If the proof shows you that Mrs. McLin never in fact contributed the amount to the common stock necessary to make her a special partner, or that she afterward altered and diminished the amount of her capital stock, and that these facts, or either of them, were unknown to the attaching creditors, at the time they dealt with the firm, and sued W. T. Tuffly, then you are instructed that neither the recognition and dealing by them with Tuffly and Mrs. McLin as a limited partnership, nor the suing of W. T. Tuffly in ignorance of said facts, estops or precludes them, or any of the defendants, from showing that said partnership was never in fact legally formed as a limited partnership, for the reason above stated, nor from showing that it afterwards, by reason of the alteration and diminution of Mrs. McLin's capital stock, was rendered a general partnership."

This instruction gave the defendants the full benefit of all the facts upon which they could rely to defeat the estoppel referred to in the other instruction.

STAVER, &c. MANUF'G CO. *v.* BLAKE ET AL.

69 N. W. (Mich.) 508. 1896.

GRANT, J. The defendants are the members and owners of the stock of the Grand Rapids Storage & Transfer Company, Limited, an association organized May 13, 1890, under chapter 79, How. Ann. St. The plaintiff is a manufacturing corporation of Chicago, Ill. It sues for merchandise alleged to have been sold and delivered to the defendants. The declaration is upon the common counts. The bill of particulars is for merchandise sold, for which notes were given, "executed by the name of Grand Rapids Storage & Transfer Company, Limited," dated January, May, and October, 1895. No claim is made that these defendants made individual promises, upon the faith of which these goods were sold and delivered, or that they had ever expressly formed a partnership, or that they had ever held themselves out to plaintiff as co-partners. The sole basis for the right of recovery against them is the failure of the original organizers to comply with the statute in organizing, and non-compliance with the statute in carrying on the business after it was organized. These defects are stated by the learned counsel to be as follows: (1) The articles did not state when and how $7,000 were to be paid. (2) They falsely stated that $13,000 in cash had been paid in, when, as a matter of fact, property instead of money had been paid in, without any schedule containing the names of the parties contributing, with a description and valuation of the property contributed. (3) No yearly or other meetings of the members of the association were held for five years. (4) No managers of the association were elected for upward of five years. (5) No subscription book was kept, as required by the statute. (6) The statute was not observed in the matter of contracting debts. (7) The statute was not observed in using the word "Limited" in connection with the associate name. The defendants contend (1) that the company was properly organized; (2) that the plaintiff was estopped to deny that the association was legally organized, and to assert partnership relations, because it dealt exclusively with the association, and not with its members as a partnership; (3) that partnership associations limited are corporations; (4) that the express penalties imposed by the statute for its violation exclude all others; (5) that these defendants, as subsequent stockholders, are innocent purchasers, and therefore not liable for irregularities in the organization or its management.

1. The Original Organization. There is no evidence of any dishonesty or bad faith in the formation of this association. It was

organized under the advice of eminent counsel, who drew the articles. On March 29, 1890, eight citizens of Grand Rapids signed an agreement to form an association to be known as the Grand Rapids Storage & Transfer Company, Limited. This agreement specified the amount each was to contribute. $12,800 were thus contributed, and, when the articles were formed, this was so stated therein. This money was invested in the purchase of property and the erection of a building for the business of the association. The capital stock was fixed at $20,000. $7,200 remained unpaid, and the articles did not specify when or how it should be paid. Technically, the $12,800 of capital was not paid in cash at the time of the execution of the articles. It was, however, paid in shortly before, and for the purpose of, forming the association, and had been expended in the purchase of property for it, and to use in its business.

Subsequent Management. It is true that meetings were not held, and managers elected, and debts incurred, in strict compliance with the statute. The business was conducted in the name of the association, and without any fraudulent intent or acts.

2. The Provisions of the Law. This act was passed in 1887, and is entitled "An act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances." Section 1 declares that "the capital shall alone be liable for the debts of such association. . . . Contributions to the capital stock may be made in real or personal estate, at a valuation to be approved by all the members subscribing to the capital of such associations." It also requires a schedule containing the names of such contributors, and the description and valuation of the property so contributed. Section 2 provides that the members shall not be liable on any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, otherwise than is provided by the act. This section further provides for proceedings in such cases, and makes the members liable for labor debts. It limits the liabilities of stockholders to the amount of their unpaid subscriptions, and requires a subscription list to be kept, which shall be open to inspection by creditors and members at all reasonable times. Section 6 prohibits division of profits to diminish or impair the capital of the association, and makes any one consenting to such a division liable to any persons interested or injured thereby, "to the amount of such division or impairment." Section 3 provides that "the omission of the word 'Limited' in the use of the name of the partnership association shall render each and every member of such partnership liable for any indebtedness, damage, or liability arising therefrom."

3. Plaintiff's action is based upon contract, not upon tort. It insists that the letter of the law, in the formation and conduct of the partnership association limited, has not been complied with, and therefore the law makes the defendants either partners or members of a joint-stock

company at the common law, and therefore individually liable. Neither of these defendants was interested in this association at its organization. The husband of Mrs. Blake was one of the principal stockholders. She advanced to him the money which he originally paid in, and also the money with which he purchased, soon after the organization, most of the other stock. The stock was assigned to her as security. Subsequently, she discharged the liability of her husband, and took the stock, and now owns all but $200 worth, owned by the defendants Aldrich and Pantland. None of these were aware of any irregularity in the original organization or in its subsequent management. Plaintiff had for several years dealt with this association as such. Its correspondence was carried on with it. Its contracts were made with it. It had no belief that it was making any contract with these defendants, or that they were individually liable, for the correspondence and course of business refute any such conclusion. The very name of the association implied a warning to plaintiff that it was not dealing with the members or stockholders of this association in their individual capacity, but in their associate capacity, with their liability limited. It is presumed to know the law, and a reading of the statute would have shown it that the members of this association could only be held liable for the amount of stock subscribed. It therefore dealt with this association with full knowledge of the extent of the liability of its members. The liability fixed by statute is still open to it. If the managers or members of the association committed a fraud by which the plaintiff or any other creditor suffered damage, the law provides a remedy in tort, but not in contract. The law does not make contracts for parties. The law takes the contracts which have been made, and interprets them. The law does not permit A. to deal and make contracts with B. in one capacity, and then hold him liable in another. A partnership can only be held to exist *inter sese* when the parties have so agreed. When no such partnership in fact exists, but a party has held himself out as such to third persons, who have dealt with him upon the faith of that relation, the law estops him to assert the true relation in order to avoid liability. Under no other circumstances does the law hold one liable as a partner who is not in fact a partner. This court said, speaking through Justice Cooley, in Beecher *v.* Bush, 45 Mich. 193: "If parties intended no partnership, the courts should give effect to their intent, unless somebody has been deceived by their acting, or assuming to act, as partners; and any such case must stand upon its peculiar facts, and upon special equities." See also Webb *v.* Johnson, 95 Mich. 330. We cite no other authorities, as the rule is elementary.

These defendants have never agreed to be partners, and have never held themselves out to plaintiff or to the world as such. By the purchase of stock, they became members of a body, organized under a law, which made its capital and assets alone liable for its debts. This is the legal entity — and it is immaterial what name you give it — with

which plaintiff dealt, made contracts, and to which it gave credit. The statute contains not a sentence from which any individual or partnership liability can be inferred. Upon what principle of common sense, justice, or equity can it now be held that plaintiff, having trusted this entity, can recover its entire debt from one with whom it never contracted, and who never promised to pay? It is unnecessary to determine whether these associations are corporations under our constitution, which provides that the term "corporations" shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. Article 15, § 11. It is the established rule that those dealing with corporations are estopped to deny the lawful existence thereof, and cannot, therefore, hold the stockholders individually liable, unless such liability is imposed by the statute. This rule is based upon two grounds: (1) That it is against public policy to permit the existence of these corporations to be attacked collaterally in suits between them and others. It is reserved for the State alone to question their legal existence through its law department. (2) Because parties have dealt with it as a corporation, and not upon the faith of the individual liability of its stockholders. We see no reason why the doctrine of estoppel should not be applied in the one case as well as in the other. There is no difference in principle between the two. Each is a legal entity, whose sole warrant for existence is found in, and whose powers and liabilities are fixed by, statute. The doctrine of estoppel in this case need not, however, be based upon the determination of the question as to whether the Grand Rapids Storage & Transfer Company, Limited, was a corporation. If these defendants, in the absence of any statute, had associated themselves together upon the same terms as those provided by this statute, had limited their liability in the same manner and for the same amount, had furnished plaintiff with a copy of that agreement, and it had sold them goods, the law would not permit him to recover against them, either as individuals or as partners. It had dealt with them and trusted them upon the strength of their limited liability. It had agreed to look to this alone, and the law will hold it to its undertaking. This rule is founded in good morals, as well as good law. The policy of the law for partnership associations limited is to relax the common-law rule, to permit parties to limit their liability, and exempt themselves from a liability which may be ruinous. Whether the policy is wise or unwise is a question for the legislature, and not for the courts.

The injustice in sustaining the plaintiff's contention is manifest. The law, as construed by counsel for plaintiff, says to A., who does not wish to actively engage in business, and be held responsible for its management: "You may invest $1,000 in the stock of one of these associations; and, although the law limits your liability to the amount of capital subscribed, still if there has been any defect, however innocently made, in the original articles of association, or in its subse-

quent management, you can be held liable for all the debts of the association." Such a rule is not founded in justice, common sense, sound logic, or good morals. Even in construing the statutes for the formation of limited partnership, no such harsh rule is always applied. Buck *v.* Alley, 145 N. Y. 488, 496. The law of Michigan prohibited a corporation from doing any business before filing its articles of association. A corporation was formed under this law, but, before it had completed its organization by filing its articles, its prudential committee purchased goods. Suit was brought against this committee, who were directors, based upon the personal liability of the members. The court, in deciding the case, said: "It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. Utley *v.* Donaldson, 94 U. S. 29. . . . The corporation having assumed by entering into the contract with the plaintiff, to have the requisite power, both parties are estopped to deny it." Whitney *v.* Wyman, 101 U. S. 392, 396.

We are aware that this decision is not in harmony with the decisions of the Supreme Court of Pennsylvania, but in so far as those decisions adopt the rigorous rule that the members of these associations are liable as partners because of some irregularity or defect in their organization or management, and thereby read into the statute a penalty which it does not impose, but which, by a fair construction of the statute, is excluded, we cannot follow them.

In one instance, in dealing with the plaintiff, the manager of this association omitted the word "Limited." No testimony was introduced on the part of plaintiff to show that any "indebtedness, damage, or liability" arose to it in consequence of this single act, and therefore no right of action from this cause was shown to exist.

The judgment is affirmed.

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§ 6. Removal to Another County.

RIPER *v.* POPPENHAUSEN et al.

43 N. Y. 68. 1870.

Peckham, J. The action was for goods sold and delivered to John G. Perzel, and the testator, as general partners. The facts, as found and conceded, are that the testator and John G. Perzel, in October, 1865, formed a special partnership in the city of New York, Perzel being the general, and the testator the special, partner. The special partner contributed $20,000 in cash to the business. The

law in respect to special or limited partnerships, was in all respects complied with for the county of New York. The certificate was filed and recorded there, and the firm proceeded with their business from October, 1865, to January 6, 1866, when the firm discontinued their business in New York of manufacturing woollen goods, and gave up their place of business there. On the 12th day of June, 1866, the firm commenced the same business in the county of Kings, in a manufactory they had built there. But no certificate of the terms of partnership, or transcript of the certificate filed in New York, was ever filed or recorded in Kings County. It does not appear that the firm ever had any place of business at any time other than stated. The question is, was this a general or special partnership in Kings County?

It is true that the statute, in regard to "limited partnerships," does not, in so many words, require a statement in the certificate of the place where the firm will do business; but looking at its different provisions, it is entirely clear that the principal or main place of business must be where the certificate of its terms is filed and recorded; at least a place of business must be there.

After stating what the certificate of the terms of the special copartnerships shall contain, the act provides that it shall be filed in the office of the clerk of the county in which the "principal place of business" shall be situated. If the partnership shall have places of business situated in different counties, a transcript of the certificate duly certified shall be filed, etc., in the office of the clerk of every such county. 1 R. S. 764, § 6. A publication of the terms of the partnership for six weeks in two newspapers, published in the senate district, in which "their business shall be carried on," is also required; otherwise "the partnership shall be deemed general." § 9. It is also provided that no such partnership shall be deemed to have been formed "until a certificate shall have been made, acknowledged, filed, and recorded," etc., and an affidavit of the amount of cash capital paid in, shall be filed.

Thus the act carefully and fully provides for filing a statement of the terms of the partnership, and for a publication thereof in the place where their business is carried on, so that the business public there may have full knowledge of the situation of the firm. But the act makes no provision for, and evidently does not contemplate a removal by the firm of its place of business to another county. It does provide for branches of the business of the firm in different counties. In such a case a certified copy of the certificate must be filed in each of said counties, but not for a removal. That is left wholly unprovided for. So that, if a firm entirely discontinue business in the original county and go to another, the act affords them no protection as special partners in this new location.

To allow a firm who had complied with the statute to do business as special partners in New York County, to remove their only place

of business to Buffalo, and proceed there without filing any certificate or making any publication, would substantially nullify those provisions. It thus appears that the defendants, so far as respects their business in Kings County, were general and not special partners. The plaintiff sold them goods in Kings County, while they were doing business there, and, as to him, they are therefore general partners.

This may well be regarded as a remedial statute, and it should receive a liberal construction, with a view "to suppress the mischief and advance the remedy." For many years it has been deemed desirable for the benefit of trade and to aid young men of integrity and capacity, but without means, that these limited partnerships should be formed. If the special partner substantially comply with the requirements of the act, he should hazard nothing but his special capital in a business which he cannot personally conduct. It is not every technical violation, every failure to comply with the letter of the law, that should deprive him of such exemption. Thus it was held that a mistake in publishing the time when a partnership commences, stating it to be the 16th of November, when it should have been October, did not make them general partners. The Mad. Co. Bank *v.* Gould, 5 Hill, 309, 311.

It is unnecessary in this case to decide whether the omission to file a transcript of the certificate of the terms of the partnership in another county, when the firm established a branch business there, would make them general partners. . . .

Judgment affirmed, with costs.

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§ 7. Renewal Certificates.

FOURTH STREET NAT. BANK *v.* WHITAKER ET AL.

170 Pa. St. 297: 33 At. 100. 1895.

Dean, J. On the 31st of December, 1891, Granville B. Haines, Richard Wood, Samuel B. Brown, Richard W. Bacon, and William Whitaker, of Philadelphia, by the name of Haines & Co., formed a limited partnership, under the Act of 1836, for carrying on a wholesale and retail dry-goods business. The term of the partnership was one year. Richard W. Bacon and William Whitaker were special partners, the others general. The special contribution of capital by each of the special partners, Bacon and Whitaker, was $100,000, — $50,000 each in cash, and a like sum in merchandise; their entire contribution as special partners being $200,000. The articles of association were subscribed by all the partners, duly acknowledged, and recorded in the office of the recorder of deeds for Philadelphia. At the end of the year 1892, under the provisions of the eleventh

section of the Act of 1836, the partnership was renewed for another year. That section reads thus: "Every renewal or continuance of such partnership, beyond the time originally fixed for its duration, shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." In the articles of renewal is this averment, referring to their articles of the year previous: "The amount of capital contributed by the said special partners to the common stock was $100,000, one-half thereof being in cash and the other half thereof being in goods and merchandise, making the aggregate amount of capital contributed by them $200,000, as designated in the said original certificate; and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise, an inventory and appraisement whereof have been filed in the Court of Common Pleas, No. 3, of Philadelphia County." On the expiration of this renewed partnership at the end of the year 1893 there was another renewal for a year, with like averments and certificate in the renewed articles, which were also made of record, as required by the act. The business was carried on, under this last renewal, until the 26th of March, 1894, when a general assignment for the benefit of creditors was made by the partnership. Before the assignment, the Fourth Street National Bank, the plaintiff, became the holder, for value, of six notes drawn by the partnership, each in the sum of $5,000, payable to the bank's order on demand, and dated, respectively, February 24, March 1, 5, 8, 14, and 21, 1894. These not being paid on demand, the bank brought suit against all the members of the firm as general partners. The sworn statement of claim avers: (1) That plaintiff accepted the notes on the faith of the writing signed by all the members of the partnership and recorded in the office for the recording of deeds the 30th of December, 1893; (2) that said writing set forth that the original contribution of $200,000 in cash and merchandise by the special partners "remains unimpaired and undiminished as their contribution to the present renewal;" (3) that at the time said writing was made and put of record the entire original capital contributed by the special partners had been consumed and lost in the business, and the partnership of Haines & Co. was insolvent; (4) that the statement that the same remained unimpaired and undiminished was false in fact. The plaintiff therefore averred liability of each and all of the members of the firm as general partners. To this the defendant William Whitaker made affidavit of defence, setting out that on the last renewal of the partnership, on 30th of December, 1893, all the members joined in a petition to the Court of Common Pleas for the appointment of an appraiser of the assets of the proposed renewed partnership, and the

appointment was made; that the appraiser under oath reported he had examined carefully and appraised the goods and merchandise of the proposed partnership, and that these included the original contributions of Whitaker and Bacon, the special partners, and the value of the same as merchandise was $200,000; that the partnership had other merchandise, accounts, and cash more than sufficient to pay its debts; further, that the $200,000 of merchandise appraised as the original contribution of capital by the special partners was set apart as such, and transferred to the new partnership. The defendant then avers on this preliminay statement of facts: (1) That he, at the time of the renewal, believed the statement and affidavit of the appraiser to be true, and that he (defendant) had done all that was required of him as a special partner. (2) That he is informed and believes the notes were not accepted by plaintiff on the faith of the statement; that the notes in suit are renewals of notes given for partnership debts of 1893, and are but a continuation of the evidence of indebtedness of the older partnership before the articles of December, 1893, for renewal were entered into. (3) That the notes sued on were given without his knowledge or consent, and plaintiff knew, when it accepted them, the general partners had no authority to impose liability on him except as special partner. (4) That he has no personal knowledge as to any misstatements of fact in the articles of 1893; that he believed the statements of the general partners and of the appraiser, whose duty it was to know, to be true. On the record thus made up plaintiff took a rule for judgment for want of sufficient affidavit of defence. After argument, the court below, in a carefully considered opinion, made the rule absolute, and defendant appeals.

The averment in plaintiff's statement that when the last renewal was signed the entire capital stock of the special partners had been lost in the business of Haines & Co., and the partnership was largely insolvent, is not denied in the affidavit of defence. It is denied by defendant there was any intentional misstatement on his part. It must, therefore, be here taken as true that, when all the members joined in the representation on the public records that the $200,000 capital remained unimpaired and undiminished, that statement was untrue in fact. The question, then, is, what effect, if any, does an unintentional misrepresentation of this character have on the liability of defendant as a member of the partnership? As already quoted, the eleventh section of the act provides for the attesting and recording of articles of renewal, and public notice of the same, under the same formalities as are required in the original formation of the partnership. The penalty of a failure to comply with the directions of the act as to the first organization is found in the eighth section, as follows: "And if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof, as general partners." This court held, in Haddock *v.* Manuf'g Corp., 109 Pa. St. 372, that: "This

evidently means that the affidavit shall give as full information upon the renewal as upon the original formation of the limited partnership. A mere formal affidavit, setting forth the renewal only, would not give creditors any valuable information as to the condition of the firm, and the object of the act was to provide this notice." Andrews *v.* Schott, 10 Pa. St. 47, is to the same effect, although in this last case there had been the introduction of a new partner, and the decision was rested on the ground that there was the formation of a new partnership instead of the renewal of the old one. But the point is settled by a deliberately considered judgment in Haddock *v.* Manuf'g Corp., *supra*, that the requirements of the act as to statement and affidavit for renewal are as rigid as in those for the original formation of the partnership. The object of the act was to open a venture to capital with the protection or advantage of restricted liability, but upon a condition that the public should have full means of knowledge as to the amount and character of the venture, and thereby be enabled to form a judgment as to how far the partnership was worthy of credit. Here the record contained the joint representation to the public of all the partners in December, 1893, that the original $200,000 remained unimpaired and undiminished, when, through business losses before that date, it had in large part disappeared. We do not consider it material that, as concerns this defendant, the misrepresentation was not intentional; that concerns his ease of conscience, but it neither restricts his liability nor affects the rights of creditors. The act seems to be carefully silent as to any modification of the language which operates to inflict the penalty. It does not say " wilfully, knowingly, intentionally false statement," but simply, " if any false statement be made," then all persons interested shall be liable as general partners. As to the nature of such a misstatement as this, it is only necessary to recur to Haddock *v.* Manuf'g Corp., *supra:* " When a special partnership is continued or renewed, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired. It must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected, the partnership becomes general, and the special partner has no immunity." Clearly, there was a false statement here of a most material fact, and although not known to defendant when he joined in the subscription to the articles, he cannot, for that reason, claim immunity as a special partner. It was his legal duty to know the truth or falsity of statements subscribed to by him, and placed on the public records; and, although ignorance of its falsity may exempt from the imputation of moral turpitude, the statute does not exempt him from legal responsibility.

The distinction drawn by the learned counsel for appellant between impaired and unimpaired capital of business partnerships is without

weight in the interpretation of this statute. The object is to give information to the creditor of the financial standing of the partnership when it invites business. Its credit depends on its ability to pay. Its ability to pay depends on the value of assets it can lawfully appropriate in payment. This partnership did have, in December, 1891, $200,000 capital in money and merchandise, to which the creditor of that term could look for payment of his debts. But in December, 1893, the partnership was wholly insolvent. All its assets were insufficient to discharge its indebtedness. It had $200,000 worth of merchandise on hand, which was set aside, and called unimpaired and undiminished capital of the special partners. But to whom did this merchandise in equity belong? Certainly to those who had given credit on the strength of it, and it was under a pledge both legal and moral to them for their debts. All that was needed to enforce forfeiture of the pledge was a judgment ripe for execution. True, the mere physical possession of the merchandise was in the partnership, but the special partners could not have withdrawn from the insolvent firm $200,000 in cash, and held it against the creditors. How could the partners, all consenting, lawfully put aside for the same partners $200,000 worth of merchandise? Yet it was represented by the statement this $200,000 was subject to the claims of future creditors, as if the partnership had been then formed, and the capital first contributed, when the fact was, after having undergone the perils of two years' business, it was impaired to the amount that the debts of the insolvent firm exceeded the assets. Of this important fact the statement contained no hint. As is said in Vanhorn *v.* Corcoran, 127 Pa. St. 255, where the assets of a partnership largely indebted were turned over as a contribution of capital to a limited partnership: "The whole of it, in equity, was liable to creditors, and could not be withdrawn from them without fraud until the last dollar of the debts of the firm was paid. So that, instead of property, the defendants contributed a mere equity, to wit, whatever was left of the assets of the firm after payment of its debts."

As to the notes sued on being given for notes issued before the filing of the renewal certificate, the evidence of the old debt was extinguished, and a new security given. The general partners had an implied right to negotiate for extension of time on matured notes, and give those of the new partnership, which last was in possession of all the assets of the old.

It is argued by appellant the effect of sustaining the judgment of the court below here will be to discourage the formation and renewal of limited partnerships, because capitalists could not longer invest their money prudently in such business enterprises. We have no fears of such consequence. For almost sixty years limited partnerships have multiplied and prospered in this commonwealth, under an unbroken line of decisions, which have uniformly exacted strict adherence to all the material requirements of the law. The credit

of such associations stands deservedly high in public estimation, because those who trust them feel they can rely on the truthfulness of their public statements. This confidence can only be maintained by a rigid judicial enforcement of those requirements, which the legislature plainly deemed important. No prudent capitalist will refrain from investment in such enterprises because compelled to a strict observance of the truth with regard to material facts. No prudent creditor will trust them if this measure of business honesty be not exacted.

We see no error in the judgment, and it is therefore affirmed.

HOGAN *v.* HADZSITS ET AL.

71 N. W. (Mich.) 1092. 1897.

MOORE, J. February 4, 1888, the firm of George Hadzsits & Co. was organized. Herman Rohns was the special partner. The other two defendants were the general partners. The special partner contributed to the capital stock of said firm the sum of $10,000 in cash. The partnership was to terminate on the 3d day of February, 1892. There is no question raised as to these papers being properly executed to create a limited partnership. At the expiration of this partnership, like articles of special partnership were signed, reciting that the partnership was to commence on the 4th day of February, 1892, and to terminate February 3, 1896. The articles recited that "said Herman Rohns, special partner as aforesaid, has contributed to the capital stock of said firm the sum of ten thousand dollars." These articles of co-partnership were acknowledged February 6, 1892, and on the same day there was attached to said articles an affidavit of the general partner Hadzsits, who swore "that the said Herman Rohns, who is therein named as special partner, has actually, in good faith, contributed in cash to the capital stock of said business the sum of ten thousand dollars." The record shows that Mr. Rohns did not contribute any cash to the capital stock of said partnership after February 4, 1888. It also shows that February 6, 1892, the excess of the assets of the firm over its liabilities to persons other than the partners was upwards of $34,000, and exclusive of all liabilities, including the liability to the partners, was upwards of $4,000. The contribution of Mr. Rohns to the firm in February, 1892, was his interest then in the firm. The record shows this was worth upwards of $10,000. After February, 1892, Mr. Rohns drew out of the firm, at intervals, sums of money which amounted, during the four years the partnership continued to exist, to $3,850, under an arrangement between the partners by which he was to be allowed 10 per cent on the amount of his investment as interest. On the trial the jury found,

in answer to a special question submitted to them, that the property of George Hadzsits & Co. was sufficient on the 6th day of February, 1896, to pay the partnership debts. At the expiration of the second partnership, in February, 1896, the firm went out of business, having given chattel mortgages on all its property. These chattel mortgages were foreclosed. The property did not bring enough to pay the unsecured creditors. It was the claim of the defendants that the property was sacrificed at the chattel-mortgage sale. The plaintiff has a claim of about $1,800 against the company, for which he seeks to hold the special partner.

There are two questions involved. First. Does the fact that Mr. Hadzsits stated in his affidavit made February 6, 1892, that Mr. Rohns had contributed in cash to the capital stock $10,000, when the cash was in fact contributed in 1888, make Mr. Rohns a general partner? Second. Was the withdrawal from the firm by Mr. Rohns of sums of money as interest on his investment such a withdrawal of the capital stock as to make Mr. Rohns liable to the plaintiff for the amount of his claim, to the extent of the amount so withdrawn?

As to the first question, the trial judge charged the jury that "under the evidence in the case, and under the certificate filed and signed by the partners, that the amount of capital stock stated in the certificate was ten thousand dollars, which was put in by Mr. Rohns, either in money, or in something equivalent to money, is a substantial compliance with the law." As to the second question, he instructed the jury that the capital stock of the company must be kept intact, and left it to the jury to say whether it had been impaired by the withdrawal of the money from the firm by Mr. Rohns. The appellant insists that the disposition of each of these questions by the trial judge is error. It is said on the part of the appellant that: "How. Ann. St. § 2344, requires the execution by all the members of a special partnership of a certificate which shall state, among other things, 'the amount of the capital stock which each special partner shall have contributed to the common stock.' Section 2346 requires that the certificate shall be filed with the clerk of the county in which the principal place of the partnership is to be situated. Section 2348 provides: 'That at the time of filing the certificate and the acknowledgment, an affidavit of one or more of the general partners shall be filed in the county clerk's office, stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually, and in good faith, contributed and applied to the same.' Section 2349 provides: 'No such partnership shall be deemed to have been formed until such certificate, acknowledgment, and affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners.' It is said the testimony shows that, to

the capital stock of the partnership which was in existence when plaintiff's assignors sold the goods on which this action is based, the special partner, Rohns, had not in good faith contributed in cash the sum of ten thousand dollars. He contributed his interest in the partnership which had expired on February 3, 1892, — an interest the value of which was entirely problematical. It might or might not have been of substantial value, and, whether it was or not, could only have been ascertained after payment of the partnership debts, and a sale of the excess of the assets, if any excess there was." It is the contention that the statement made in the affidavit that Rohns had contributed in cash to the capital stock of the company $10,000 was not true; that the statute must be strictly followed, and the statutory result of the false statement is that Rohns is liable as a general partner for all the partnership engagements; citing Bates, Lim. Partn. 56, 60, 61; Pierce *v.* Bryant, 5 Allen, 91; Haviland *v.* Chace, 39 Barb. 283; Haggerty *v.* Foster, 103 Mass. 17; Richardson *v.* Hogg, 38 Pa. St. 153; Eliot *v.* Himrod, 108 Pa. St. 578; Vanhorn *v.* Corcoran, 127 Pa. St. 265; Haslet *v.* Kent, 160 Pa. St. 85; Durant *v.* Abendroth, 69 N. Y. 151; Bank *v.* Huber, 75 Hun, 80; 26 N. Y. Supp. 961. These cases undoubtedly hold that contributions of United States bonds, or of promissory notes or acceptances, or of a stock of goods, or the property or assets of another partnership, are not to be regarded as payments in cash, in the formation of limited partnerships. Many of these decisions were in States which require the contribution to the capital stock made by the special partner to be made in cash, while in our State the contribution may be made in cash, or other property at cash value. We do not think, however, a fair interpretation of this record will show that what was attempted to be done, or what was in fact done, was the creation of an original limited partnership. It was rather the renewal for another period of four years of a limited partnership then in existence; continuing the same business with the same partners and with the same assets which belonged to the firm at the expiration of the term for which the original articles of partnership provided. Section 2352, How. Ann. St., provides for the renewal or continuance of such partnerships, and that a "certificate shall be made, acknowledged, recorded, and published in the like manner as is provided in this chapter for the formation of limited partnerships," etc. It is unfortunate, perhaps, that the statute does not provide just what this certificate shall contain. In Bates, Lim. Partn. § 122, it is said: "Considering how utterly inadequate in its instructions this section of the statute is [he is discussing statutes of similar import to ours], it is astonishing that there have been no more decisions upon it. The statute requires the renewal to be certified as in the original formation. As the certificate of formation certified a cash contribution, or in specific articles at a valuation, it is obvious that a literal compliance with the statute is impossible, and no instructions are given to

guide us." If there cannot be a literal compliance with the statute, is it just to say that if there has been a substantial compliance with the statute, and an attempt, in good faith, to comply with its terms, the special partner shall be made a general one because the impossible was not done? "The difficulty is to know how minute must be the information to be contained in these documents. A going business is often not susceptible of exact estimate as to its own standing, capital, etc. Its standing of one day is not its standing of the next day, not only because new contracts may be made and old ones completed, and new debtors and creditors created, but because the ebb and flow of markets make the value of the stock a constantly fluctuating amount; and unseen changes in the ability and solvency of those indebted to the firm may affect it to a high degree without any of the partners being at all aware of the change. Moreover, the capital, which originally was cash, is no longer so. It has now become a stock of goods or improvements or property. It is perfectly plain that the renewal certificate cannot state that there is a present cash capital, or its accurate value. It would therefore seem that the statute should be construed as allowing a renewal regardless of the condition of the association; that the statutory certificate, record, affidavit, and publication need contain no new matter not in the original certificate; that the partnership is renewed for a certain further time; and that any other matter analogous to the re-recording of a mortgage of personalty is practically a re-statement of the original facts. Such, judging from the statements of facts in the cases of renewals, has been the practice." Bates, Lim. Partn. § 127. Doubtless this was the view held by the person who prepared the certificate and affidavit for the purpose of renewing the partnership. We do not think it unreasonable to say that the statute contemplates that the renewal certificate and affidavit are to be read in connection with the original certificate and affidavit. If this is done, no one can be misled. It would appear from such a reading that the limited partnership was created in 1888; that at that time Mr. Rohns contributed in cash to the capital stock of the company $10,000, and that four years later the limited partnership was continued for another four years. We have not overlooked the decision of Haddock *v.* Manufacturing Corp., 109 Pa. St. 372, which reads: "When a special partnership is continued or renewed, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired. It must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected, the partnership becomes general, and the special partner has no immunity." The Pennsylvania Court held substantially the same doctrine in relation to limited partnership associations, but this court declined to follow that doctrine in the recent cases of Staver & Abbott Manuf'g Co. *v.* Blake (Mich.), 69

N. W. 508, and Rouse *v.* Cycle Co., Id. 511. We think such a construction reads into the statute provisions it does not contain. The court did not err in his disposition of the first question raised.

Counsel for appellant insist that under the provisions of section 2355 the special partner is made liable, to the extent of any unpaid debts, for all sums withdrawn from the firm, and that as the record shows the plaintiff is unpaid, and the special partner withdrew more than the amount of the plaintiff's claim, the judge should have directed a verdict in his favor. The statute provides for liability for interest or profits withdrawn only in case the withdrawal reduces the capital stock below the sum stated in the certificate, or if at any time during the continuance, or at the termination of the partnership, the property or assets shall not be sufficient to pay the partnership debts. Both of these propositions were submitted to the jury, who found the capital stock had not been impaired, and that at the termination of the partnership there were assets sufficient to pay the partnership debts.

The judgment is affirmed.

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§ 8. Ante-Partnership Negotiations.

HINDS et al. *v.* BATTIN et al.

163 Pa. St. 487: 30 At. 164. 1894.

McCollum, J. All the equities of the case are with the defendants, and in accord with the judgment appealed from. In the negotiations which resulted in the contract under which the goods were delivered the defendants were not acting for themselves or a general partnership, but for the Scranton Match Company, Limited, an association organized under the Act of June 2, 1874, and its supplements. The plaintiffs, through their agent, knew the signature of the association, what had been done in the way of organizing it, what its capital was, and the measure of the liability of its members. The statutes under which it was formed and the articles on which it was founded were read and explained to him, and his knowledge was theirs. With this information, the correctness of which is not disputed, they dealt with and furnished their goods to and on the credit of the association, and not until it passed into the hands of liquidating trustees in consequence of losses in business and the destruction of its plant by fire did they claim that the defendants, as individuals or general partners, were liable for the goods so sold and delivered. It was shown on the trial, and found by the referee, that the defendants paid their subscriptions to the capital stock of the association, and it is not alleged that its insolvency was the result of fraud or mismanagement. The plaintiffs' contention is, therefore, not only

opposed to the terms of the contract and the understanding between them and the defendants when it was made and the goods were furnished under it, but to the equities of the case. It is a contention based upon a technicality, which depends on their construction of the Act of 1874. It appears that the articles of association were not recorded when the order of December 14, 1886, was made, or when it was changed, on the 29th of March, 1887; but it is beyond dispute that they were duly recorded some time before the goods were delivered, and before the contract under which the deliveries were made became absolute and binding upon the match company by its approval of the samples. . . . These orders were mere proposals, subject to the approval of the plaintiffs and to the approval of the match company of the proofs and samples of the goods. Strictly speaking, there was no contract until these approvals were given, as they were in the nature of conditions precedent to its existence. The original orders were changed on the 29th of March by the maker and approvers of them, and if at any time there was a binding and absolute contract in conformity with them it was avoided by the agreement then made. Whether the orders recognized and acted upon after this agreement are called new or modified orders, is of no consequence. Surely the approval of them, and the samples furnished under them, constituted a contract inconsistent with any contract arising from the approval of the original orders, and the proofs submitted in pursuance of them. The samples furnished by the plaintiffs under the new or modified orders were approved by the association on the 26th of May, 1887, and thenceforth there was an absolute contract between the parties on the basis of these orders, by which alone their rights and obligations in respect to the subject matter of it were measured. It was a contract between the plaintiffs and the Scranton Match Company, Limited. Did the failure of the company to record the articles before the commencement of the negotiations which culminated in the contract after they were recorded render its members liable as individuals or general partners for the goods delivered to it? We think not. It is the status of the association when the contract was made that must be considered in answering this question, and it is admitted that when it approved the samples furnished under the new orders it was qualified to enter into contracts in connection with and for the proper prosecution of the business for which it was organized. These views are in harmony with the learned referee's findings of fact and conclusions of law. We have not deemed it necessary to notice *seriatim* the numerous specifications of error filed in the case, although we have examined and considered all of them, together with the argument of the learned counsel in support of them. It is sufficient to say that we discover nothing in the specifications which, in our opinion, calls for or would justify a reversal of the judgment.

They are accordingly overruled, and the judgment is affirmed.

§ 9. Partnership Capital.

BRADBURY et al. v. SMITH.

21 Me. 117. 1842.

Trespass by the plaintiffs, Bradbury and Coffin, as co-partners against the defendant, a sheriff, for taking and carrying away certain goods as firm property under a process against Bradbury, one of the partners, to satisfy a debt due from him only. The entire capital had been contributed by the special partner, Coffin. A verdict was taken for the plaintiffs, which was to be set aside, if this court held that the action could not be maintained.

Codman & Fox, for the defendant.

F. O. J. Smith, for the plaintiffs.

Shepley, J. Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties. In this case the agreement signed by the plaintiffs declares, that the "special partner has contributed $1,500 as capital to the common stock." And there can be no doubt that it was their intention to form a limited partnership under the provision of the statute of 1836, c. 211. If it be admitted that a general partnership was not created by a failure to comply with the provisions of the seventh section of the act, which requires that "the names of the general partners only shall be inserted without the addition of the word company or any other general term;" the act would still require, that the special partner should contribute a sum in cash, and that it would become a portion of the capital stock of the partnership. The act provides, that "the general partners only shall transact business," and the goods must be purchased by them. The contracts and bills of purchase would be between the seller and the partnership as the purchaser, and the goods would become the property of the partnership. And this would but carry into effect the agreement and intention of the parties, the partnership becoming a debtor to the special partner for the amount of cash by him contributed. A loss of the goods in the shop by fire, or otherwise, would not have fallen exclusively upon the special partner as the sole owner, but upon the partnership. Although at the time of the commencement of this partnership the capital stock was all contributed by the special partner, the general partner would afterward be daily contributing to it by his time and attention to the business. It cannot therefore be correct to assert, that the capital stock at the time of the attachment, after several months' continuance of the partnership, remained as the sole contribution of the special partner. It might have happened, by a rise in the value of the goods first purchased, and by large profits on the sales of these and of other goods subsequently purchased, that the capital would have been more than doubled during the two years pro-

vided for its continuance. And as the special partner was to receive as profits a sum only equal to the legal interest on the money advanced, the general partner might at that time become entitled to a larger portion of the capital stock. There is no evidence that the goods attached were a part of those originally purchased by the cash advanced by the special partner. And if they were not, they must have been purchased on the credit of the partnership, or by funds partly accruing from the services of the general partner in transacting the business.

Whether the special agreement, or the intention of the parties to it, or the legal effect of their acts, be considered, the result is the same; that the goods in the shop must be regarded as the property of the partnership. And it has been already decided in the case of Douglass *v.* Winslow, 2 App. 89, that such goods are liable to be attached for a separate debt of one of the partners.

The verdict is to be set aside, and a nonsuit entered.

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§ 10. PREFERENCES FORBIDDEN.

CROUCH *v.* FIRST NAT. BANK OF CHICAGO ET AL.

156 Ill. 342: 40 N. E. 974. 1895.

WILKIN, C. J. This is an appeal from a judgment of the Appellate Court of the First District affirming a decree of the Circuit Court of Cook County sustaining a demurrer to a bill in chancery. The bill was filed by appellant, Chester B. Corbin, in behalf of himself and all other creditors of the limited partnership of Bois, Fay, & Conkey, against William A. Bois, Benjamin B. Fay, Lucius W. Conkey, Julius K. Graves, the First National Bank of Chicago, and others. It alleges that the complainant purchased of the limited partnership of Bois, Fay, & Conkey, on November 15, 1882, their two promissory notes, dated October 30, 1882, due in 90 days and 4 months from date, one for $1,734.21, and the other for $2,016.92, both payable to the order of the makers, and indorsed by the firm name. It then sets up the organization on March 30, 1882, of a limited partnership by Bois, Fay, and Conkey, with Julius K. Graves as a special partner, contributing to the partnership the sum of $50,000, to continue to March 30, 1887; setting out the certificate of partnership, acknowledgment, filing, and recording the same, in conformity with sections 4–6, c. 84, Rev. St. (2 Starr & C. Ann. St. p. 1565); also the filing of an affidavit by Benjamin B. Fay, one of the general partners, required by section 7 of the same chapter, the affidavit being copied at length. It further alleges publication of the terms of the limited partnership, and that: "Having, in all things, complied with the provisions of the

Limited Partnership Act, William A. Bois, Benjamin B. Fay, and Lucius W. Conkey, and Julius K. Graves as a special partner, constituted a limited partnership, under the firm name of Bois, Fay, & Conkey," and thereupon, on March 30, 1882, commenced in the city of Chicago the business of dealing in groceries at wholesale, which it continued to carry on under its firm name until in the month of January, 1883. That during that time it contracted debts and incurred obligations amounting to much more than its assets, and being insufficient to pay more than 50 cents on the dollar thereof. That during said month of January, and for several months prior, it had great difficulty in meeting its debts; and to pay the same as they matured, and conceal the actual condition of its affairs and its insolvency, it borrowed and secured large sums of money by loans, and discounts of its commercial paper. That on or about December 2, 1882, said Bois, Fay, Conkey, and Graves, well knowing said limited partnership was insolvent, and with the intent to hinder, delay, and defraud such of the creditors of said limited partnership as they did not intend to prefer, and in contemplation of insolvency, and with intent to prefer certain of their creditors, and with the intent to evade the provisions of the said act under which said limited partnership was organized, pretended to dissolve said limited partnership; and for that purpose they caused to be filed on or about December 20, 1882, a paper purporting to be a dissolution of said partnership, but that said paper writing was ineffectual for the purpose of effecting any dissolution of said limited partnership, and was a mere device contrived by said Bois, Fay, Conkey, and Graves to evade the provisions of said Limited Partnership Act, and give color of authority and validity to the acts of said Fay and Conkey in the execution of judgment notes, and confessions of judgments thereafter to be entered against them. That after said pretended dissolution said Fay and Conkey pretended to carry on said business, and assumed to own all the assets of said limited partnership. That said Bois and Graves pretended to release and convey their interest in the limited partnership assets to said Fay and Conkey, but that such release or conveyance thus executed was wholly inoperative, and fraudulent and void as against the complainant and other creditors of said limited partnership, and made with the intent to hinder, delay, and defraud such creditors. That, under said act of the general assembly of Illinois under which said limited partnership was formed, all the assets of the said limited partnership were secured and pledged to the payment of the debts ratably, and that it was the duty of said Bois, Fay, Conkey, and Graves, when they first had knowledge of the insolvency of said limited partnership, or at the time of their pretended dissolution thereof, to have some competent trustee appointed to take possession and charge of the assets of said partnership, and convert the same into money, and distribute it ratably among the creditors of said limited partnership. (After setting out the judgments confessed, pur-

suant to said fraudulent scheme, the levy upon and sale of the firm chattels for less than their value, and the appointment of Hitchcock as receiver of said firm, the bill prayed:) That each of the defendants answer (but not under oath), setting forth the actual amount due to them, respectively; the consideration of their several demands; when they became due, and what amount had been realized thereon. That each of the said confessed judgments may be decreed to be illegal and void, and that the said pretended transfer of the property and assets of said limited partnership to said Benjamin F. Fay and Lucius W. Conkey was fraudulent and void. And that it be further decreed that all the goods and merchandise levied upon and seized under the said executions based on said confessed judgments, or either of them, and the notes, drafts, bills of exchange, debts, and choses in action so taken possession of by said Hancock, were and are the goods, chattels, property, assets, effects, and choses in action of said limited partnership, and as such subject to the lien of, and charged with the payment of all debts due and owing by said limited partnership, ratably and in the proportion that each debt bears to the whole indebtedness of said limited partnership, and that each of the defendants be decreed to pay to the receiver appointed herein whatever sum they or either of them have received out of the said limited partnership assets by virtue of their respective judgments, or any proceeding or suit based thereon. That, out of the moneys paid to such receiver, he shall pay all costs, expenses, and attorney's fees necessarily incurred in the prosecution of this suit, and the remainder to be paid ratably to the creditors of said limited partnership, and that summons may issue, etc. . . .

There can, we think, be no doubt that the bill shows upon its face that complainants are entitled to the relief sought, if it sufficiently appears that the limited partnership of Bois, Fay, & Conkey legally existed. The statute expressly provides: " It shall not be lawful for any such partnership, nor any member thereof, in contemplation of bankruptcy or insolvency, and with the intention and for the purpose of paying or securing any one or more of their creditors in preference to any other of their creditors, to make any sale, conveyance, gift, transfer, or assignment of their property or effects or to confess any judgment, or to create any lien whatsoever upon their property or effects; and every such conveyance, gift, transfer, or assignment involving such judgment or other lien, shall be and the same is hereby declared to be utterly void," c. 84, § 22, *supra*.

Chancellor Walworth said in Innes *v.* Lansing, 7 Paige, 585, speaking of the New York statute similar to our own: " The title of the Revised Statutes relative to limited partnerships appears to have constituted the effects of the firm a special fund for the benefit of all the creditors, which fund, in case of insolvency, is to be distributed among such creditors ratably, in proportion to the amount of their respective debts. By the fifteenth section the special partner is pro-

hibited from withdrawing any part of the capital of the firm, or any of its effects, except actual profits made upon the original capital; and by the twentieth and twenty-first sections every sale, assignment, or transfer of any of the property or effects of the firm, or of the property or effects of a general or special partner, after the firm or himself has become insolvent, or in contemplation of such insolvency, with the intention of giving a preference either to a creditor of the firm or to a creditor of the general or special partner, is declared to be void, as against the creditors of the partnership. The general and special partners are also prohibited from confessing any judgment creating any lien upon the partnership property, or the property of any of the partners, or giving any security, under such circumstances, and with such intent. It is evident from these statutory provisions that the legislature could not have intended that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, the necessary effects of which might be to give him a preference over other creditors, before he could be permitted to file a bill in this court to prevent the partnership funds from being wasted by the insolvent partners, and to obtain payment of a ratable portion of his debt out of the fund. Although any creditor, therefore, may proceed at law for the recovery of his debt, unless a decree has been obtained in this court for the benefit of all creditors equally, or the property has been transferred to a trustee or receiver for the purpose of having such a ratable distribution thereof, I think this court is bound to carry into effect the principle of the statute, by treating the property of the limited partnership, after insolvency, as a trust fund for the benefit of all the creditors; and if the insolvent partners neglect to place the partnership effects in the hands of a proper and responsible trustee, to be distributed without delay among all the creditors of the firm, other than the special partner, ratably in proportion to the amount of their several debts, either due or to become due, any creditor may file a bill in this court in behalf of himself and the other creditors of the firm, and may have a receiver appointed to protect the trust fund, and to distribute it among the several creditors who may come in and prove their debts under the decree to be obtained on such bill." This case is followed in Whitcomb *v.* Fowle, 56 How. Pr. 367; Batchelder *v.* Altheimer, 10 Mo. App. 181. See also Whitewright *v.* Stimpson, 2 Barb. 379; Troub. Lim. Partn. § 393.

The controlling question in this case, then, is, does the bill show the formation of the partnership in question? Both courts below held that it does not, and for the single reason that the affidavit by Benjamin B. Fay, one of the general partners, that the amount specified in the certificate of partnership to have been contributed by the special partner, Graves, had been actually contributed, did not conform to the requirements of section 7, *supra*. The language of the section is: "At the time of filing the original certificate as before

directed an affidavit of one or more of the general partners shall also be filed in the same office, stating that the amount in money or other property at cash value specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same." The affidavit set out in the bill is as follows:

"State of Illinois, County of Cook. — ss.: Benjamin B. Fay, being duly sworn, deposes and says that he is one of the general partners in the limited partnership and firm of Bois, Fay, & Conkey. And deponent further says that the amount of fifty thousand ($50,000) dollars, stated in the certificate of said partnership to have been contributed to the capital stock thereof by the said special partner, has been actually contributed and applied and paid in to the same. Benjamin B. Fay."

"Subscribed and sworn to before me this 30th day of March, A. D. 1882. [Seal.] J. Edward Fay, Notary Public."

The objection to it as a compliance is that it does not state in what "the amount of $50,000 was contributed," or that the amount was contributed "in good faith." Counsel for appellant insist that, even if it should be held that this affidavit does not conform to the requirements of section 7, the only result would be to make Graves liable as a general partner, leaving the limited partnership still existing. This position, under the allegations of the bill, we do not regard tenable since section 8 of the statute expressly provides that "no such partnership shall be deemed to have formed until such certificate, acknowledgment, and affidavit, shall have been filed as above directed." Our conclusion, however, is, upon a further consideration of the point, that the affidavit is in fact a substantial compliance with the requirements of statute. Section 7 does not prescribe the form in which the affidavit shall be made, nor require the use of particular words in making the statement. That is to say, if this affidavit had stated that the contribution was in silver coin or national bank currency, and honestly made, it could not have been reasonably urged that it was insufficient because it did not say "in money," and "in good faith." All that the statute requires is that if the contribution is made in money the affidavit shall be in language sufficiently definite to show that fact, and that it was contributed fairly and honestly. Bates, Lim. Partn. § 31. The statement here that "the amount of fifty thousand dollars was actually contributed and applied, and paid into the same," can reasonably be given no other meaning than that it was contributed and paid in cash. In Johnson *v.* McDonald, 2 Abb. Pr. 297, the language in an affidavit, "paid in, in good faith, to the common stock of said firm, the sum of one thousand dollars," was held to mean "paid in cash," the court saying: "What is the legal meaning of 'paid in'? Can these words mean, legally, anything else than 'paid in cash'?" So in Holliday *v.* Paper Co., 3 Colo. 343, the language was, "Has contributed to the

said firm of Holliday & Co. the sum of twelve thousand dollars, which said sum has been actually and in good faith contributed to the business and applied to the common stock of said firm," and it was said: "The only interpretation to be given this language is that it was $12,000 in cash." Counsel for appellee say those cases are distinguishable from this because there the language is, "sum of," etc., whereas here it is the "amount of," etc. We do not concur in this view. The words "sum" and "amount," in the connection in which they are used, must be given the same meaning. It seems clear to us that this affidavit cannot be true, as contended by counsel, and yet the contribution have been in the promissory note or agreement of the special partner to pay. "Pay in" does not mean a promise or agreement to pay, but actual payment.

Does the affidavit show that the contribution was made "in good faith"? "Good faith" means "honest, lawful intent; the condition of acting without knowledge of fraud, and without intent to assist in a fraudulent, or otherwise unlawful scheme." And. Law Dict. The fact which must be shown by the affidavit, as required by the statute, is that the amount specified in the certificate of partnership to have been contributed by each of the special partners to the common stock has been honestly, and without fraud, paid in and applied; and we think the statement that it has been actually paid in (which, as we have seen, means paid in in cash), contributed, and applied fills every requirement of the statute. "Actually" paid in, contributed, and applied means "in fact," "really," "in truth," paid in, contributed, and applied. See definition of the word "actually." Webst. Int. Dict. We are unable to see that the addition of the words "in good faith," in this affidavit, would have done more than emphasize what was in fact stated. The affidavit, as made, could not have been true, if the contribution of $50,000 was merely colorable. It has been suggested that, for anything appearing in Fay's affidavit, the money may have been paid in to be immediately withdrawn, but we do not think so. If paid in merely as a formal matter, with the intention of again drawing it out, it was not actually paid in, contributed, and applied to the capital stock, and the affidavit was absolutely false. The addition of the words "in good faith" would have stated no fact not alleged in the affidavit as made. The most that can be said is that their use would have made it more explicit. As we have said in Henkel *v.* Heyman, 91 Ill. 96, the statute authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners; and we do not wish to be understood as giving a meaning to the language "substantially complied with" which will dispense with the statement of any fact required to be shown in the affidavit made necessary by section 7. What we do hold is that those facts need not be stated in any particular language, and that they sufficiently appear in the affidavit in question, and that, therefore, the

limited partnership of Bois, Fay, & Conkey was legally formed. Counsel for appellee make the further point that, even though this is true, the bill shows upon its face that such partnership was dissolved; and they insist that complainant cannot attack the legality of that dissolution, as a mere contract creditor. The allegations of the bill, admitted by the demurrer, are to the effect that the partnership was not in fact dissolved, but that the parties thereto merely pretended to dissolve the same in furtherance of their purpose to prefer certain creditors, and to wrong and defraud the complainant and others, and that their action in that regard was wholly illegal and void. That being true, no reason exists why a contract creditor may not attack an unlawful preference, the same as though no attempt had been made to dissolve the partnership. . . .

Reversed and remanded.[1]

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§ 11. Transformed into General Partnerships.

PERTH AMBOY MANUF'G CO. *v.* CONDIT ET AL.

21 N. J. L. 659. 1847.

Carpenter, J. It is assigned for error that the judge on the trial refused to nonsuit the plaintiffs below for certain reasons alleged, which I will notice in the order presented by counsel.

The first relates to the form of the action. The partnership of the plaintiffs below was shown to be one formed under the statute in relation to limited or special partnerships, Act of February 9, 1837, Elm. Dig. 376, under the name of Condit & Bowles, the two general partners. One of the special partners, James Vanderpool, having died in the latter part of the winter of 1843, his son, Beach Vanderpool, in whom his interest had vested, took his place. It was urged that by § 12 of the act every alteration made in the name of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, causes a dissolution of the partnership. That this was such alteration contemplated and provided for in that section, and that by the provisions of the same section, the partnership being carried on after such alteration, became a general partnership, and subject to the general doctrine regulating such partnership. That having become by such alteration general, the names of all the parties surviving must necessarily be used in all suits brought by the firm; at any rate, that the action should have been brought by Condit & Bowles, as surviving partners. Without expressing any opinion as to the correctness of this construction of

[1] Parts of the opinion dealing with questions of practice have been omitted. Baker, J., did not concur.

the act, and whether the death of one of several special partners will operate as a dissolution, it is a sufficient answer to say, that the liability of the defendant below, if any, accrued before such death occurred. On any such alteration as is specified by the section of the act cited, it is the partnership carried on after such alteration shall have been made, that is to be deemed a general partnership, unless renewed as a special partnership, according to the provisions of a preceding section. The 12th section therefore does not apply to prior debts, or other transactions of the firm. Suit brought by the firm, for prior debts,[1] must, by the very terms of the statute, be brought in the names of the general partners. The action therefore was rightly brought. . . . *Judgment affirmed.*

SINGER *v.* KELLY.

44 Pa. St. 145. 1863.

THOMPSON, J. On the 15th of June, 1856, a co-partnership was formed for the transaction of a general commission business, in the city of Philadelphia, between William J. Martin, William McAllister, and Charles Kelly, under the firm name of Martin & McAllister. It was to be a partnership under the Act of Assembly of the 2d of March, 1836. Martin and McAllister were to be the general partners, and Kelly the special partner. The firm was duly organized, and Kelly paid in $20,000 in cash, his agreed contribution to the firm. The firm commenced business, but in about six months failed, sinking the entire sum contributed by the special partner, and had an unliquidated indebtedness of some $78,000, which the assets were totally inadequate to satisfy. Under these circumstances, the plaintiff has brought this action against all the partners (on four firm notes), seeking to make the special partner liable on the ground that the business of the firm was changed, and that such change, without first having a new certificate, rendered him liable.

The evidence of a change consisted of two distinct purchases by Martin & McAllister: one on the 26th of June, 1857, of fifty bales of cotton, amounting to $4,200, for which they gave notes; and the other four days after, of sixty tierces of rice, at $2,100, also on a credit of four months. The learned judge of the District Court who tried the case was of opinion that there was no proof of knowledge or assent by the special partner to these purchases, outside the legitimate scope of the business of the firm. He therefore reserved the point whether a special partner could be made liable for a change in the business without a knowledge that it had taken place, and directed a verdict for the

[1] This action was brought for goods sold to the Perth Amboy Manufacturing Co. by Condit & Bowles, before the death of James Vanderpool.

plaintiff, subject to the entry of judgment for the defendant *non obstante veredicto.* Subsequently, and after argument *in banc* in the District Court, judgment was entered for the defendant on the point reserved. We have before us, therefore, the case, "pure and simple," of an effort to charge a special, as a general partner, on account of a change in the business of the firm, without any knowledge whatever of a change in the business of the firm, either in point of fact, or as a presumption arising from his connection with the transaction. Can this be done?

The section of the act under which this result is claimed is the 12th section, and reads as follows: "Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and any such partnership which shall in any manner be carried on after such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership according to the last (preceding) article." The contest was therefore really between intelligent action as the ground of liability, on the one hand, and a claimed liability by force merely of the words of the statute, regardless of the element of knowledge or assent, on the other. Did the legislature mean this last position to be the true interpretation of the clause? Unless it plainly appears that liability, without any reference to knowledge or intentional violation of the provision in question, was meant, we should not give it a construction tending to such penal consequences as is contended for. It would be contrary to natural justice, and such result should not be arrived at by interpretation unless it be inevitable.

It is a maxim, further, which declares that no one shall suffer for another's fault: "*Nemo punitur pro alieno delicto.*" I admit there are exceptions to the rule, however, things *mala prohibita* may induce liability sometimes without the knowledge really of the party ultimately liable. In cases of suretyship, liability always arises out of the acts or omissions of the principal. But in these cases the consequence results from positive legislative regulations on the one hand, and the nature of the engagement on the other. But neither of these relations exists here. I cannot find any warrant, under a fair interpretation of the clause of the statute, for holding that the special partner is a guarantor for the general partners, further than his deposit according to the contract, nor that it is to be construed as a penal statute. I think that an analysis of the statute itself will show that its consistency can only be preserved by holding the special partner to be involved alone by his own acts or omissions of violation, or by assenting to those of his co-partners, when he knows or is presumed to know them. We have no decisions on the precise point under consideration in our own State, nor have any been referred to as adjudged in other States where a similar law exists. We must, therefore, explore the meaning of this clause by the light of other provisions in the statute, involving the same responsibility.

Dissolution of the partnership is what, in contemplation of the law,

was the first consequence to flow from any of the changes or alterations spoken of in the section. But the law also contemplates the carrying on of the business in an associated and general form of partnership, without the limitation provisions, and holding all liable as general partners. It is the carrying on of the business, after a violation in any of the particulars specified, which turns the concern into a general partnership. None of the general partners, without the knowledge or assent of the special partner, could change "the nature of the business" so as to render the special partner liable; it would be to apply a more severe rule than could obtain if the violation consisted in a change of the firm name, or of the capital or shares in it, which manifestly could not be done without the assent of all; and yet the consequences would be the same. Thus there would be no distinction between intended violations and those neither intended nor known.

In many other provisions of the statute the consequences of violations are fixed to the extent of general liability of the special partner; but without exception I think they all imply the knowledge or assent of the party to be charged by the acts done, to which the consequence is attached. A false statement in the original certificate has this effect, and this must be made by all. So, after organization, transacting the business of the firm, or acting as agent or attorney for it, interfering in its business, and, perhaps, for reducing capital, will each render the special partner liable; but they all imply volition with knowledge of the act. The twentieth and twenty-first sections of the act, especially, exhibit the rule of practice evidently intended by the legislature. Assignments for certain purposes, and with certain intent, after insolvency or contemplated insolvency by the firm or by a partner under the same circumstances, is forbidden; and the twenty-second section provides that if any special partner shall violate any of these provisions, or assent to any such violations, he shall be liable as a general partner. The ground of liability is here plainly expressed as only to ensue in consequence of a personal violation of the inhibited act, or assenting to its violation by co-partners. I argue, therefore, that if the statute throughout, as I think it does, fixes the consequences of violation of its provisions to be general liability, and they necessarily imply knowledge and assent, we may fairly presume that the same cause was supposed to be necessary to produce the same result in the clause in question. If the change in the nature of the business, therefore, by his co-partners, was not known by the defendant Kelly, and the business was carried on afterward without his knowledge that it had been so changed, he would not be liable in consequence thereof.

It is not intended to deny that the requisites of the statute must be strictly pursued in organizing and conducting limited partnerships, but this should not change the rule of interpretation, which requires, in public beneficial statutes, that construction which will promote their objects rather than destroy them. One of the great objects of the system of limited partnerships was to encourage the employment of

capital, without personal activity on the part of its owners, by associating it with industry and enterprise, which might not be possessed of capital. But should we hold that a change in the business, which might be made by the active partners, without the knowledge or assent, either actual, or to be presumed from circumstances, of the special partner, the capitalist, and he is liable notwithstanding, it would deter all prudent men from investing or embarking their capital in any such way; for by the very terms of the act he is not allowed to interfere with the operations of the concern. Such a construction would put him completely within the power and at the mercy of his co-partners. But when we hold him only for his own acts or assent, we place responsibility on its true footing, the choice of the party.

These views are supported by the case of The Madison County Bank *v.* Gould, 5 Hill, 309. That case arose on the New York statute regulating limited partnerships, from which ours was copied, I believe, *verbatim*. It was attempted in that case to hold the special partner liable as a general partner. One ground was a mistake of a month in the advertisement: in setting forth the commencement of the firm to be in November instead of October. The court there held, that as there was no evidence of any intentional violation of the statute in the mis-publication, the special partner was not liable by reason of it. Another ground claimed for liability was the investment of a large portion of the capital in the purchase of real estate, not within the scope of the business of the firm. The special partner's liability was made to turn on the question of knowledge and assent to the purchases, although the conveyance was taken in his name, as well as that of his co-partners. Bronson, Judge, said: "I cannot think him liable for the wrong done by his co-partners, without showing that he participated in the act." In the same spirit is Bowen *v.* Argall, 24 Wend. 497. We are of opinion, therefore, that there was no error in the ruling of this point in the court below.

We see nothing in the other specifications of error requiring special notice. We agree with the court below that we see no reason for holding that the special partner had anything to do with the care and collection of the debts of the firm after it failed. If he was not involved as a general partner he had no concern in it. His money was in it, and applicable to the debts, and that was the only extent of his connection with it. There was no offer to show that Kelly assented to any assignment of assets, so as to render him liable on that score, and the court properly rejected the naked offer to prove that the general partners made some such assignments.

Judgment affirmed.

SARMIENTO ET AL. *v.* THE CATHERINE C.

67 N. W. (Mich.) 1085. 1896.

LONG, C. J. . . . It is objected by defendant's counsel that Sarmiento & Co. was a special partnership, and that by reason thereof the suit, being in the name of the general partnership, must fail. It appears that the partnership articles were adopted between Mr. Sarmiento and Mr. Bowen on March 23, 1887. This was a limited partnership, and Mr. Bowen was a special partner thereunder. This partnership, by its terms, was to terminate on March 1, 1892; and upon the trial it appeared that it had terminated before this contract was made. The rule is that, when a limited partnership expires, the partners become general partners if the business continues by the partners. Troub. Lim. Partn. 120. We think, therefore, that the court was not in error in permitting the action to be sustained in the name of both complainants.

Judgment affirmed.

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§ 12. CREDITORS OF THE GENERAL PARTNER.

SHERWOOD *v.* HIS CREDITORS.

42 La. Annual, 103. 1890.

POCHÉ, J. This appeal involves the discussion of the validity of a pledge granted by the insolvent to Francis Martin, his partner *in commendam*, on all of the insolvent's share in the partnership property, to secure an indebtedness of $5,000. The contest is between the partner *in commendam*, as a creditor of the insolvent individually and the creditors of the partnership. The partner *in commendam* prosecutes this appeal from a judgment which refused to recognize and enforce his rights of pledge.

The pertinent facts are as follows: A pre-existing partnership, carrying on the business of manufacturing doors, blinds, sash, etc., under the style and name of the "Enterprise Sash, Door, and Blind Factory," and composed of Alexander Smith, Francis Martin, and Philip W. Sherwood, was dissolved in the early part of November, 1887, and Sherwood bought out Smith's interest in the concern for $5,000 cash, which he paid with money loaned him by Martin. Immediately thereafter, Sherwood executed an act of pledge of his two-third interest in the factory in favor of Martin to secure his indebtedness of $5,000 to the latter. On the same day the two entered into a co-partnership under an authentic act, with Martin as a partner *in commendam*, to continue the same kind of business under the same style and name as heretofore. In the new business Sherwood contributed his undivided two-third interest in, and Martin his third of, the factory, with a stip-

ulation of equal shares in profits and losses, limiting Martin's losses to his contribution. On the 19th of April, 1888, Sherwood made a surrender of the partnership assets, and a syndic was appointed on June 15, 1888.

Martin's claim, under its terms and in accordance with the act of pledge having matured, he obtained an *ex parte* order on June 12, 1888, for the sale of Sherwood's interest in the concern, which had been pledged to him. Before a sale could be effected his proceeding was enjoined by the syndic on numerous grounds, one of which was that, as Martin was a partner, his pledge was of no effect toward the creditors of the partnership. The syndic having thereafter proceeded to a sale of all the assets of the concern, he presented an account on which he placed Martin as an ordinary creditor only. By way of opposition, Martin urged his rights of pledge on the proceeds of two-thirds of the partnership assets. Whereupon Shakspeare, Smith, & Co., creditors of the partnership, opposed Martin's right of being considered as a creditor of the partnership at all, on the ground that he was only a creditor of Sherwood individually. The various oppositions and the injunction proceedings were consolidated and tried together, resulting in judgment by which the syndic's injunction was perpetuated, Martin's pledge was denied and rejected, in so far as it could affect the rights of the creditors of the partnership, his opposition dismissed, and the opposition of Shakspeare, Smith, & Co. maintained.

From the foregoing statement of facts, tested under well settled principles of law and of jurisprudence, it is apparent that the judgment thus rendered is correct in every particular. The fallacy of appellant's contention consists in his assuming the attitude of a third party, or of a stranger, in dealing with the insolvency proceedings of Philip W. Sherwood, for the purpose of winding up the business of the concern known as the "Enterprise Sash, Door, and Blind Factory." It is elementary in commercial law, as well as under the provisions of the Civil Code, that "the partnership property is liable to the creditors of the partnership in preference to those of the individual partner." . . . Art. 2823. And for such purposes, the partner *in commendam* is in no better position than an active partner. As a member of an insolvent partnership his only immunity consists in the restriction of his liability for the debts of the concern to the amount which he had agreed to furnish by his contract. C. C. 2842.

A partnership with a partner *in commendam* may exist in every association known as partnerships, and it cannot be treated as a separate division of partnerships. C. C. 2840. Ulman & Co. *v.* Briggs *et al.*, 32 An. 660; Marshall *v.* Lambette, 7 Rob. 471. Hence it follows that in determining the rights of Martin in and to the partnership assets as a creditor of Sherwood, he must be treated with the same measure which would be meted out to a simple commercial partner whose share in the concern is liable for partnership debts, and whose claims as a creditor of his partner must be subordinated to the claims of creditors of the partnership. Gueringer *v.* Creditors, 33 An. 1279.

As soon as the partnership between Sherwood and Martin was formed, their respective previous and individual interests or shares in the factory were vested in the ideal being known as the partnership, and no portion thereof could again become the property of the partners, but the residuum, after the payment of the partnership debts. Succession of Pilcher, 39 An. 362. Hence the district judge was correct, not only in holding that the pledge set up by Martin on the previous interest or share of Sherwood in the concern could not be enforced to the detriment of the creditors of the partnership, but that, as he was only a creditor of Sherwood, he had as such no right to participate in the distribution of the proceeds of the partnership assets. His only recourse is on the residuum which might accrue to his debtor after the full liquidation of the partnership.

As he had no pledge which he could enforce adversely to the creditors of the concern, it follows that he had no legal right to wrench the property from the possession of the syndic for the purpose of effecting a sale of the same independently of the insolvency proceedings. Hence the injunction sued out to stay his proceeding was properly perpetuated. *Judgment affirmed.*

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